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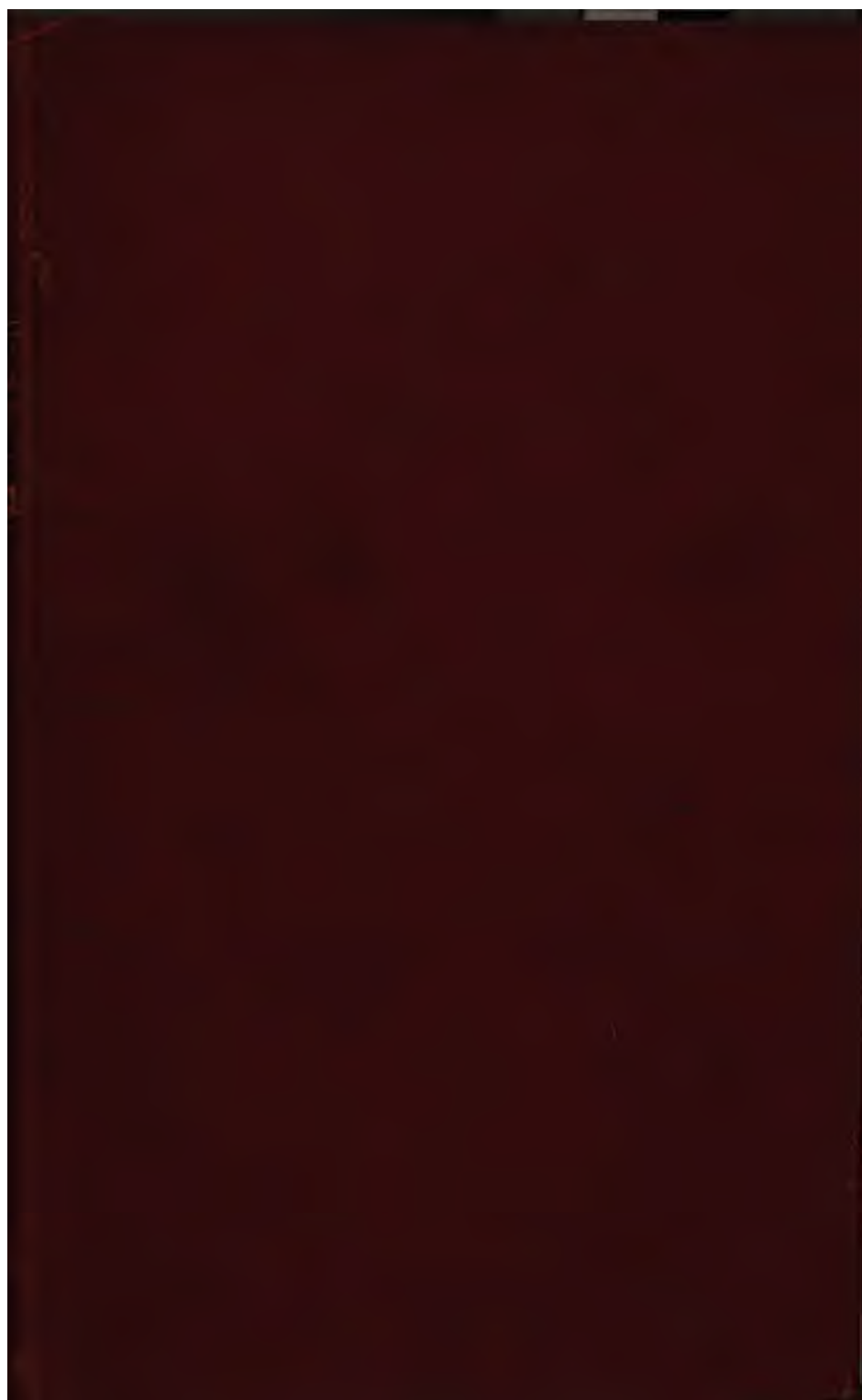
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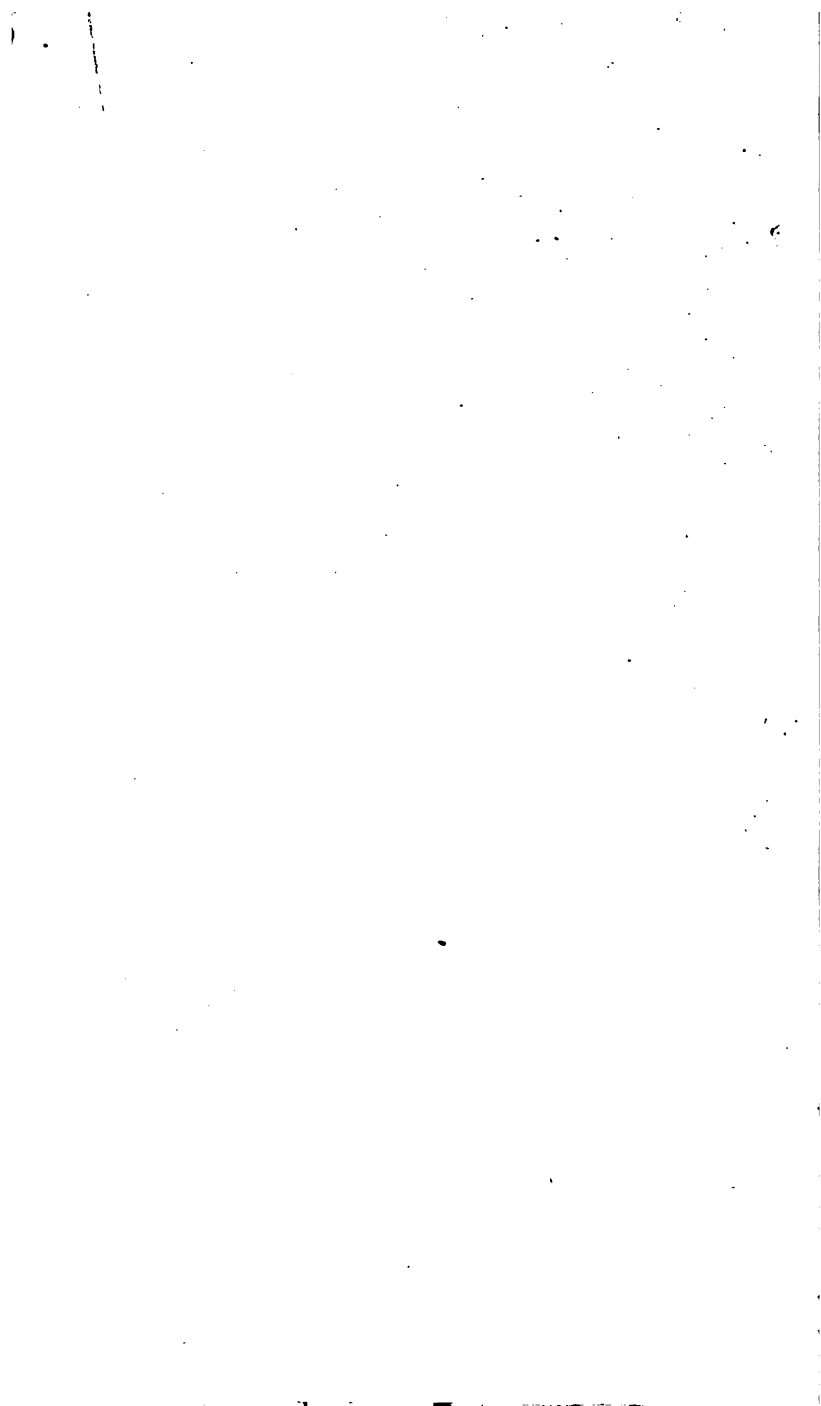
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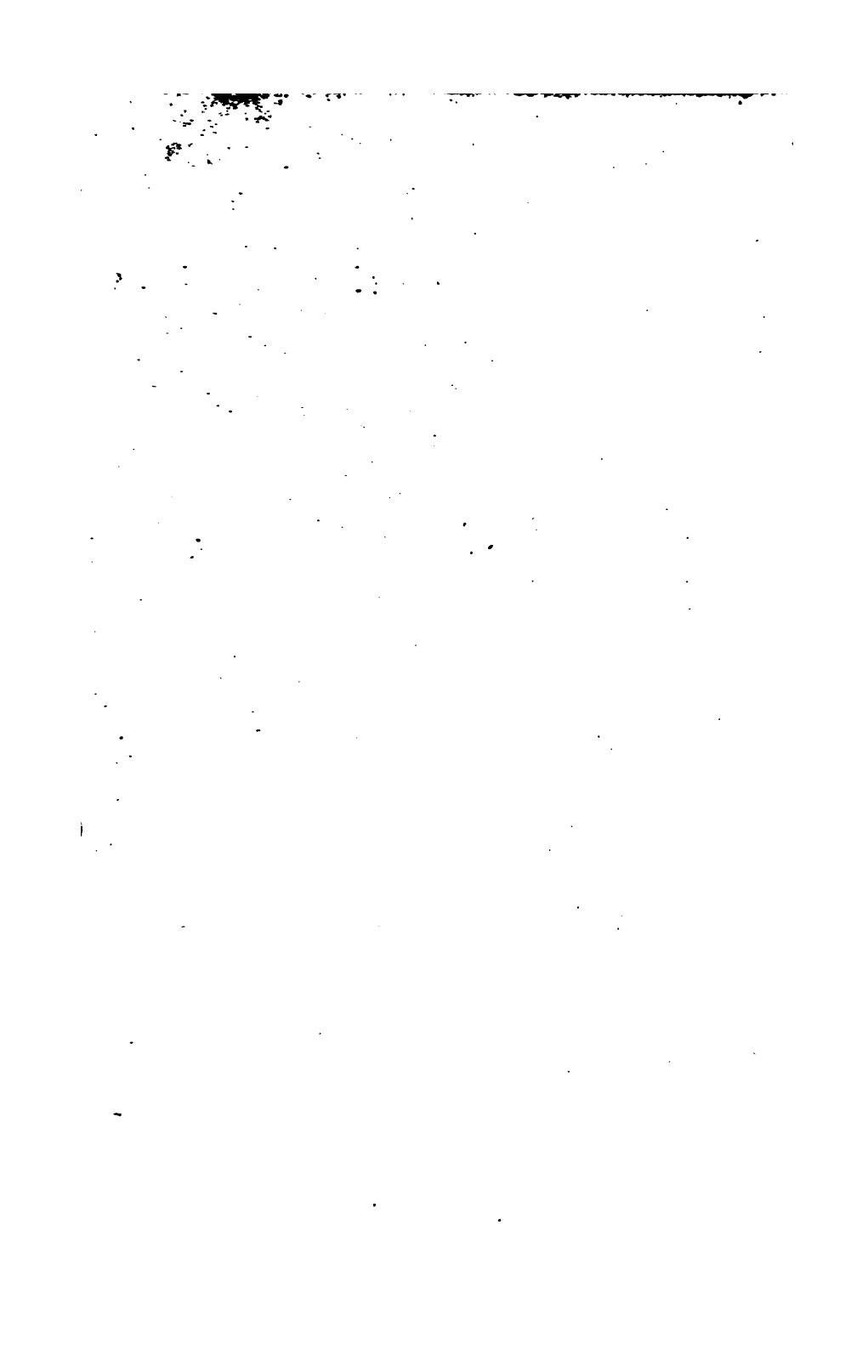
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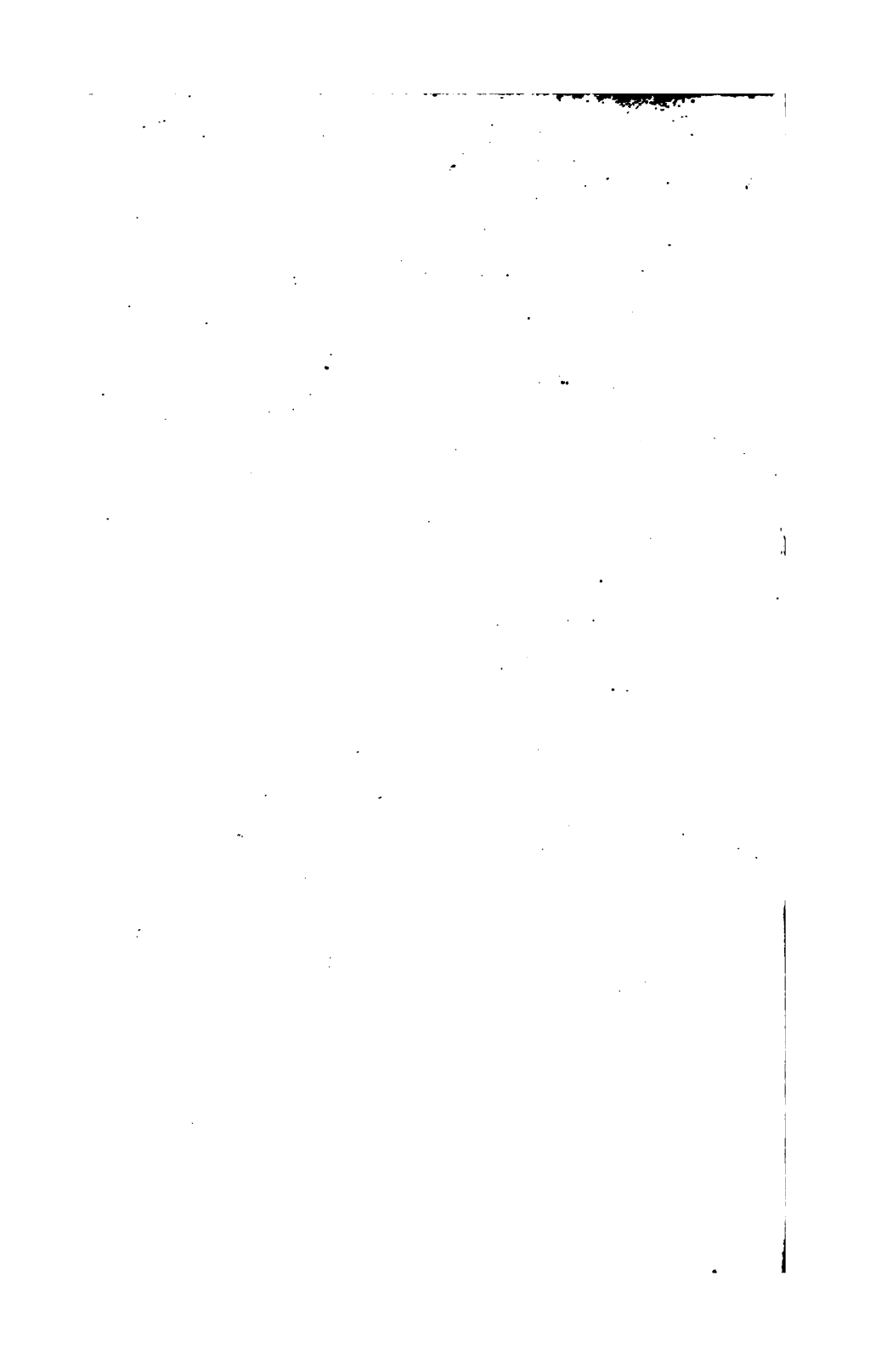


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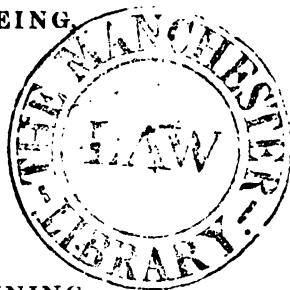


THE
PRACTICE
OF
THE COURT OF
Common Pleas at Lancaster,
IN
PERSONAL ACTIONS, AND EJECTMENT.

BY WILLIAM WAREING
ATTORNEY AT LAW.

LONDON:
SAUNDERS AND BENNING;
ADDISON, PRESTON.

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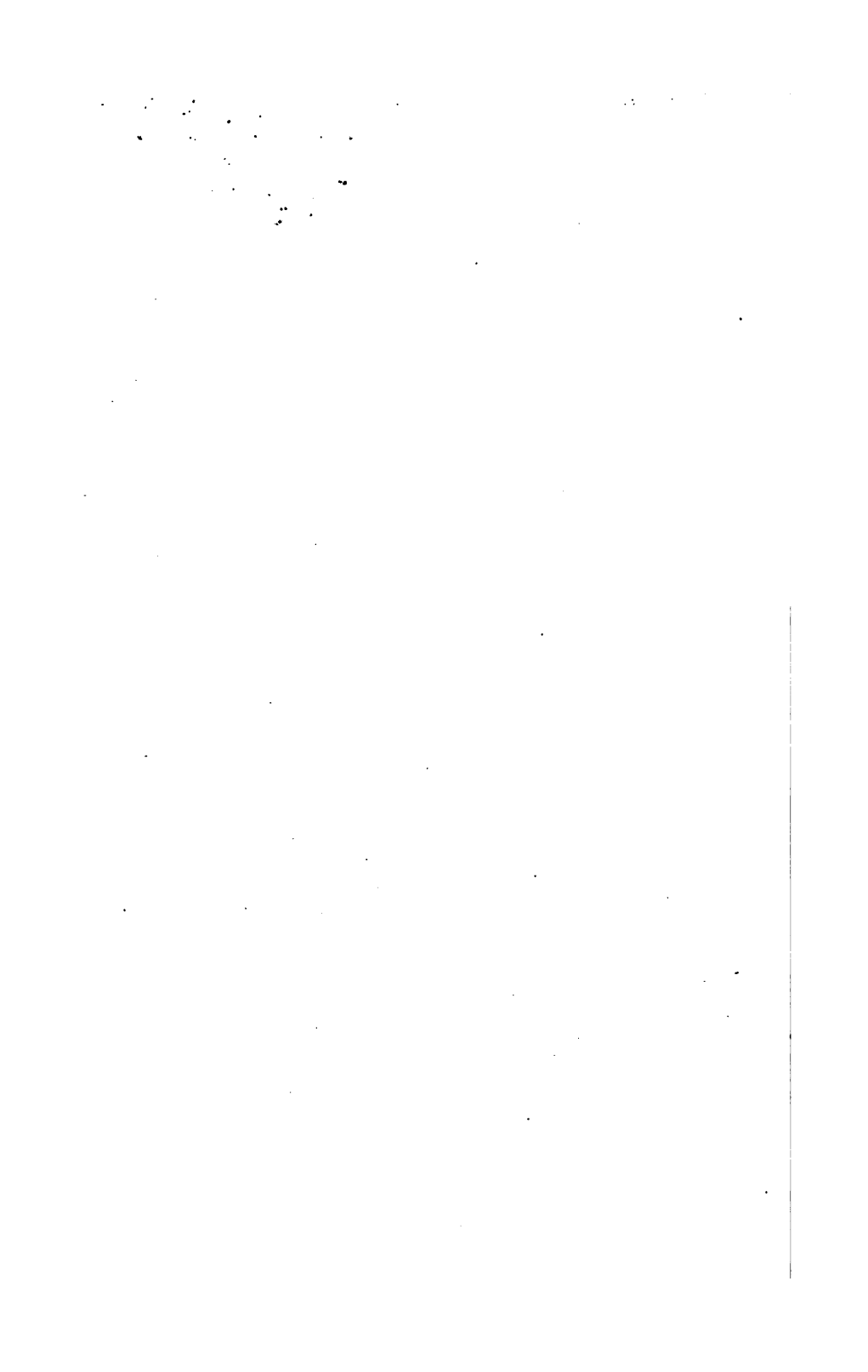
A T T O R N E Y S

OF THE

County Palatine of Lancaster,

THIS TREATISE

IS RESPECTFULLY INSCRIBED.



PREFACE.

IN presenting the following compilation to the public, the writer tenders his grateful acknowledgments for the kind assistance of his friends.

It has been his endeavour to bring within the reach of the profession, either in terms, or substance, all the statutes and general rules which regulate the practice of the Court of *Common Pleas at Lancaster*; and to particularize such of the proceedings as differ from those of the superior Courts at Westminster.

Selections have been made from the manuscript notes of the Prothonotary, as well as the official Books and Records of the Court: and some of the latest decisions are given relative to such points of practice, as have been most affected by the new rules, and the statute 4 & 5 W. IV., c. 62.

The Treatise is divided into *five* Books. The *first* comprising certain preliminary matters, such as the jurisdiction of the Court, its Judges, Officers, Records, and Returns. The *second* Book contains a detail of the proceedings in an action, from its commencement to the trial. In the *third*, the practice relating to judgments is considered. The *fourth* treats of proceedings in particular actions, and against particular persons. And the *fifth* comprises such miscellaneous matters of practice, as could not well be introduced under any preceding title.

Fully sensible that errors may be found in this, his first work, the Author throws himself upon his readers' indulgence, for the pardon of them; and hopes that notwithstanding its imperfections, the publication may be found in some degree useful, at the present period. Should this expectation be realized, the labours of the writer will receive an ample recompence.

Chapel Walks, Preston,
June, 1836.

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INTRODUCTION.

OF THE COUNTY PALATINE OF LANCASTER AND ITS COURT OF COMMON PLEAS.

THE Court of Common Pleas at Lancaster being one of those peculiar jurisdictions which have resulted from the constitution of counties palatine, a brief account of the nature and origin of such counties may be proper, as an introduction to the following pages.

The very name of *Palatine* imports a vast extent of authority, being derived from *palatium* or palace; the owners of counties palatine having therein kingly rights, as fully as the king possessed within his palace; *regalem potestatem in omnibus* (a): and hence there is no higher franchise than that of a county palatine. Nature of Counties Palatine.

These petty sovereignties, it is thought, owe their origin to reasons of policy; for by giving to the counties of *Chester, Durham, and Lancaster* each a domestic judicature, the inhabitants thereof were the less frequently obliged to leave their homes, to seek redress at distant tribunals; and were, consequently, the better prepared to protect their counties against the frequent incursions of their Scotch neighbours, on the one hand, and the Welch on the other (b). Their origin.

On this account, says the historian of Lancashire, there were formerly two other counties palatine, border counties, as they were called, viz., *Pembrokeshire* and *Hexhamshire*, (the latter now united to *Northumberland*) but these were abolished by parliament, the former in the twenty-seventh year of the reign of *Henry VIII.*, and the latter in the fourteenth year of the reign of *Elizabeth* (c).

(a) *Brac. lib. 3, C. 8, s. 4. 4 Inst. 204. 6, Vin. Ab. 574* and seq. *Faber, v. Patten*, 1 *Vent. 155. Chaetham, v. Crook*, and others, 1 *M'C. and Y.*, 311.

(b) 1 *Bl. Com. 118. Bac. Ab. Tit. Courts Palatinate. Fisher, v. Patten, Supra.*

(c) *Baines' History of Lancashire, Vol. 1, page 200. (note), 1 Bl. Com. 118.*

Present Counties Palatine.

Of the three counties palatine still remaining, viz., Chester, Durham, and Lancaster, the first is the most ancient, for it appears that William the Conqueror granted this County to Hugh Lupus, Earl of Chester, *tenendum sibi et hæredibus, ita libere ad gladium, sicut ipse Rex tenebat Angliam, ad Coronam* (d). The like ample grant was soon after made, of the Bishopric of Durham, to that Prelate (e); and the County of Lancaster was the last that was created Palatine; but, says Lord Coke (f), "although it was the youngest brother, yet it was the best beloved of all the other; for it had more Honours, Manors, and Lands, annexed to it, than any of the rest."

It has, however, been the opinion of some, that Lancaster enjoyed the privileges of a County Palatine before the Norman Conquest (g); but most of the writers on the subject, state that it was created a County Palatine by Edward III. (after it became a Duchy), in favor of Henry Plantagenet, first Earl, and then Duke of Lancaster, whose heiress (Blanche), being married to John of Gaunt, the King's son, the Franchise was greatly enlarged, and confirmed in Parliament, to honour John of Gaunt himself, whom, on the death of his Father-in-law, the King had also created Duke of Lancaster (h). The Charter bears date (1377) 51 Edward III., and is expressed in these terms:—

Charter of the County Palatine of Lancaster.

"Rex omnibus, ad quos, &c., salutem. Sciatis quod si nos, debitâ consideratione pensantes gestus magnificos cunctorum, qui nobis in guerris nostris laudabiliter et strenuè servierunt, ipsos desideramus honoribus attollere, et pro viribus, juxta merita, præmiare; quanto magis filios nostros, quos, tam in sapientiâ quam in gestu nobili, alios præcellere conspiciamus, et qui nobis locum tenuerunt et tenere poterunt potiozem, nos convenit majoribus honoribus et gratiis prærogare?"

(d) 4 Inst. 211.

(e) 1 Reeves' Hist. Com. Law. 48.

(f) 4 Inst. 210.

(g) Baines' Hist. of Lancashire, Vol. 1, page 199.

(h) 4 Inst. 204. Plowd. 215. 1 Vent. 155. 2 Reeves' Hist. Com. Law, 367, 8. 1 Bac. Ab. 634. Selden, Tit. Honor. 1 Bl. Com. 117.

" Considerantes itaque probitatem strenuam et sapientiam præcellentem, carissimi filii nostri Johannis Regis Castellæ et Legionis, Ducis Lancastriæ, qui laboribus et expensis semper se nobis obsequiosum exhibuit, pro nobis plurius, in necessitatibus, intrepide se guerrarum discrimini-
bus exponendo ;

" Et volentes, eo prætextu, ac desiderantes eundem filium nostrum aliquali comodo, et honore ad præsens, (licet non ad plenum, prout digna merita exposcunt) remunerare, ex certâ scientiâ nostrâ, et læto corde, de assensu prælatorum et procerum, in instanti parlamento nostro, apud Westmonasterium convocato, existentium, concessimus pro nobis et hæredibus nostris, præfato filio nostro quod ipse, ad totam vitam suam, habeat, infra comitatum Lancastriæ, cancellariam suam, ac Brevia sua sub sigillo suo pro officio cancellarii deputando consignanda, Justiciarios suos, tam ad placita coronæ quam ad quæcunque alia placita communem legem tangentia tenenda, ac cognitiones eorundem, et quascumque executiones, per Brevia sua et ministros suos ibidem, faciendas, et quæcumque alia libertates et jura regalia, ad comitatum palatinum pertinentia, adeo integrè et liberè sicut Comes Cestriæ, infra eundem comitatum Cestriæ, dignoscitur obtinere :

" Decimis, quintisdecimis, et aliis quotis et subsidiis, nobis et hæredibus nostris, per communitatem regni nostri, et decimis et aliis quotis, per clerum ejusdem regni, nobis concessis, et imposterum concedendis, aut eidem clero per sedem apostolicam impositis et imponendis ; ac pardonationibus vitæ et membrorum, in casu quò aliquis, ejusdem comitatûs, aut alius, in eodem comitatu, pro aliquo delicto, vitam vel membrum amittere debeat : ac etiam superioritate et potestate corrigendi ea, quæ in curiis ejusdem filii nostri ibidem erroneè facta fuerint ; vel si idem filius noster, aut ministri sui, in justitiâ, in curiis ejusdem filii nostri, inibi faciendâ defecerint, semper salvis :

" Et est intentionis nostræ quod idem filius noster, ad mandata nostra et hæredum nostrorum, ad parlamenta et concilia nostra duos milites, pro comunitate comitatûs prædicti, et duos burgenses de quolibet burgo ejusdem comitatûs, ad tractandum, cum aliis de communitate dicti

regni nostri, ad eadem parlamenta et concilia venientibus, de negotiis dicti regni nostri, in eisdem parliamentis et conciliis exponendis, mittere teneatur.

"Et quod idem filius noster certos homines, fideles et sufficientes, ad hujusmodi decimas et quintasdecimas, subsidia, et alia quota, quotiens ea nobis seu hæredibus nostris in parliamentis seu conciliis concedi contigerit, colligenda assignet; ita quod nobis et hæredibus nostris de sic concessis respondeatur per eosdem. In cujus, &c.

"Teste Rege, apud Westm. xxviii. die Februarii,

"Per ipsum Regem de assensu totius parliamenti."

Title to the
County Palatine
of Lancaster.

The privileges thus granted to the Duke of Lancaster for life, were afterwards confirmed and amplified by several charters of Richard the second; and, by an act of Parliament made in the first year of the reign of Henry IV. the Duchy of Lancaster was settled upon that king and his heirs, and made independent of the possession of the crown; and finally, by an act of Parliament made in the first year of the reign of King Henry VII., the duchy, including the county palatine with all its incidental honours and privileges, was assured to that sovereign and his heirs for ever, separate from the crown of England. It has, however, accompanied the succession to the crown, as settled at and after the revolution (*k*).

The palatinate
Courts of Lan-
caster.

The exclusive administration of justice by his own courts of Law and Equity, formed one principal branch of the *Jura Regalia* conferred upon John Duke of Lancaster. These courts consisted, as at present, of a superior court of Criminal jurisdiction, a court of Equity, and a court of Common Pleas for the decision of civil suits, exercising within the county a jurisdiction, in as ample a manner as the courts at Westminster (*l*).

The place of
holding them.

Previous to the creation of the County Palatine of Lancaster, the assizes were held occasionally, if not uniformly, at Preston (*m*): but soon after that event, John of Gaunt

(*k*) See 1 BL. Com. 118, 119, (note).

(*l*) 1 Bac. Ab. Tit. Courts Palatinate. And see 1st Rep. of Commissioners of C. P. L. page 2, 3.

(*m*) See page 16 (note) of such Report.

obtained a royal charter for the exclusive right of holding at Lancaster "the pleas and sessions of all Justices whatsoever, assigned for the said county." Since that period, the palatinate courts of common law have generally been holden at Lancaster, but not invariably so: for it appears from the style of the plea-rolls of the common pleas at Lancaster, of 6th Edward IV., and 11th Henry VIII., that the assizes were then held at Preston; and some of the writs in the time of Henry IV., and succeeding reigns to Henry VIII., are tested at Preston and elsewhere. For several centuries however, until of late, the assizes for this county have been held exclusively at Lancaster.

The places originally fixed upon for holding the assizes, ^{Removal of the Assizes.} were the principal and chief towns of every county (a); but many of the then principal towns, have ceased to be so: and the ancient town of Lancaster, once the metropolis, as it were, of the county, and the residence of its sovereign dukes, is now far surpassed in population and commercial importance, by Liverpool and Manchester.

Such changes, rendered it expedient, in some counties, to alter the seats of judicial tribunals, and led to the passing of the stat. 3rd and 4th Will. IV. c. 71, which confirmed the power of the King, to order as to what places, in any county in *England or Wales*, the assizes should be holden; and particularly empowered him to direct the court of common pleas at Lancaster, to be holden at one or more place or places in the county, and to divide the county for that purpose.

In pursuance of the above act, his present Majesty on the 24th of June, 1835 (o), ordered the assizes for the county palatine of Lancaster, to be held on the same circuit both at Lancaster and Liverpool; and the county to be divided into the Northern and Southern divisions: the one including the Hundreds of Lonsdale, Amounderness, Leyland and Blackburn; and the other, the Hundreds of Salford and West Derby: and all business as well civil as criminal, for the Northern division, was thereby directed

(a) See Stat. 6, Rich II. c. 5.

(o) See London Gazette of the 26th June, 1835.

to be transacted at Lancaster; and all for the Southern division, at Liverpool. On the day after this order was issued, a similar one was made, for the court of common pleas at Lancaster (p).

The Bench at Lancaster.

The Judges of the common law courts of the county palatine of Lancaster (q), being chosen from those of the courts at Westminster, the administration of justice within the county, is of the most exalted character, and the Bench there has been occupied from time to time by men of the highest legal attainments.

The Bar.

The attendance of counsel at the assizes is very numerous; and it is an encouraging circumstance that many of the Barristers of the Northern circuit, have risen to stations of the greatest eminence; and not less than eight of the present judges of the superior courts at Westminster, have been counsel on this circuit.

Attorney General.

The Attorney General for the county palatine, is an officer of this circuit; and there are also two king's counsel for the palatinate (r). The Attorney General derives his appointment from the Chancellor of the Duchy, and takes precedence at the bar here. The other counsel rank according to their precedency, in the courts at Westminster.

Officers of C.P. L., Records, &c.

The officers of the court of common pleas at Lancaster, and the records of its proceedings, are treated of in the course of the following work. With respect to the practice of the court, a few general remarks, which cannot well be introduced under any of the following heads, may be made in this preliminary chapter.

Practice of C.P. L.

Its practice resembles as nearly as circumstances will permit, that of the court of common pleas at Westminster; but in many particulars it is less complicated, and indeed its superior advantages in some instances, and especially in the frequent returns of process, have formed the basis of some of the improvements recently made in the courts of

(p) See further on this subject post, B. 1, Ch. 5.

(q) As to the appointment and functions of the Judges, see post B. 1 chap. 2.

(r) Baines' Hist. of Lancashire. Vol. 1, page 221.

common law at Westminster. One great advantage in its practice is, that the whole of the business is transacted at a single office at Preston, which is always open, except on Sundays, Christmas day, and Good Friday, under the immediate management and superintendence of one officer, the deputy Prothonotary (s).

Various statutes and rules of court have been made, from time to time, for improving the practice of the court; but it has been reserved for our own day, to effect those mighty changes, which have completely altered the general system of legal proceedings. Modern Improvements in Practice.

On the 18th February, 1829, his late Majesty, Geo. IV. issued a commission, directed to Sir James Scarlett, Knight, (now Lord Abinger), the Hon. Robert Henley Eden (now Lord Henley), and Thomas Starkie, Esquire, to inquire into the practice of the palatine courts of Lancaster, which commissioners in their report dated the 13th December, 1830, after mentioning the advantages resulting to this county from the establishment of its own courts, recommend certain alterations to be made in the practice of those courts, and especially of the common pleas.

Many of the improvements suggested by the commissioners, have since been adopted; some by means of general rules of court, and others by the late important statute 4 and 5, W. 4. c. 62. Among the principal of these improvements may be mentioned the adoption of the same forms of process, for the commencement of personal actions, as have lately been established, by the uniformity of process act, for the courts at Westminster—the providing a means of enforcing obedience to the writ of subpoena, when served out of the jurisdiction of the court—the establishing of an unexceptionable court of appeal, especially on motions for new trials, and for the discussion of special cases—and the providing of a more efficacious proceeding for enforcing a judgment recovered in this court, where the defendant has no effects within the county, and does not reside there. It may here be observed, that many persons had long desired such a change in the proceedings of in-

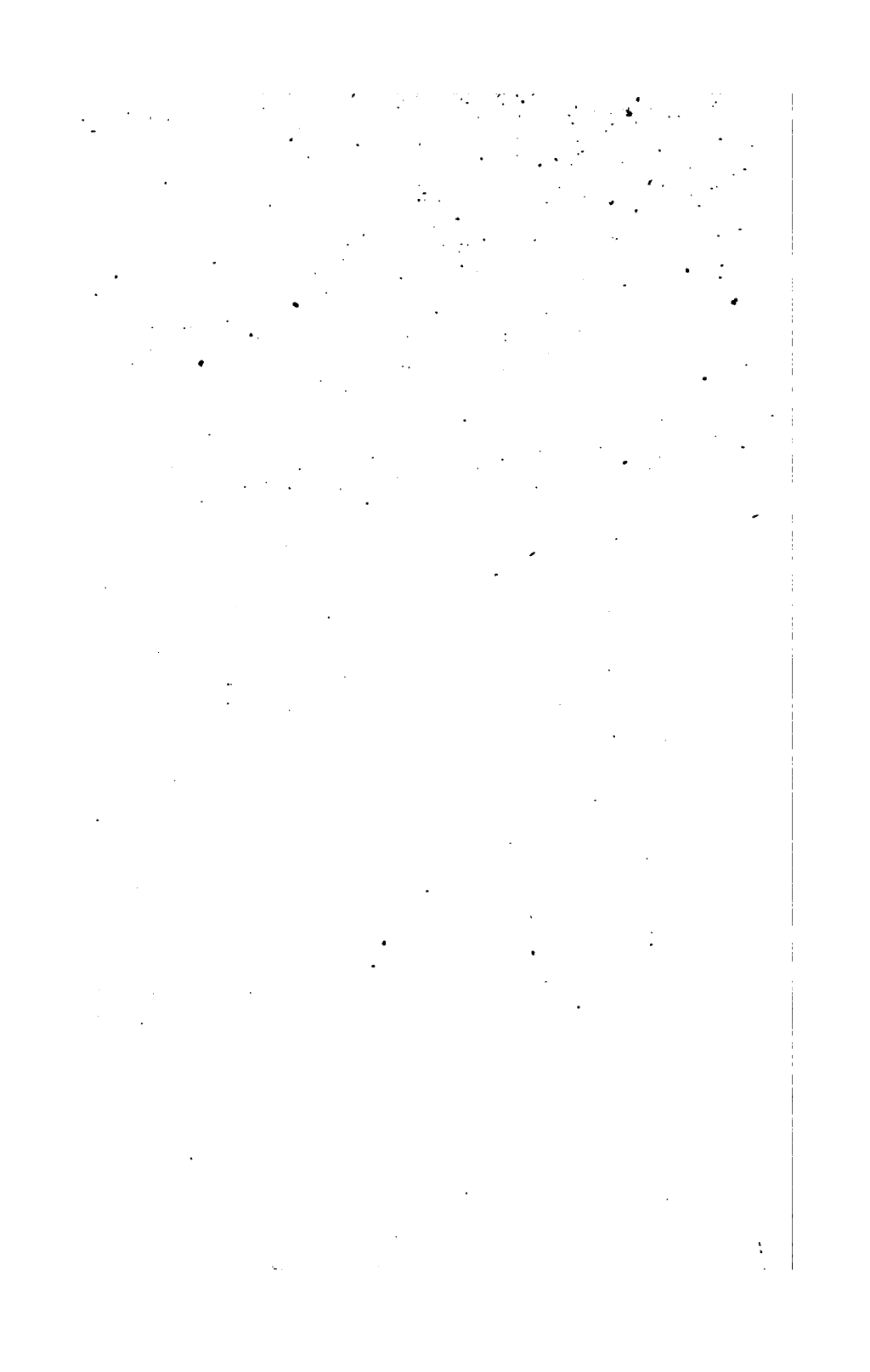
(s) See 1st Rep. of the Commissioners of C. P. L., page 3, 4, 5, 6.

ferior courts of judicature, as would secure to a successful party in a suit, the due execution of final process, and at the same time leave an unsuccessful suitor, less exposed to the extortion and oppression, too often practised in the execution of the process of such inferior courts. A remedy has, in some degree, been provided against this evil, by the establishment of new tribunals, for the trial of causes of small amount, depending in a superior court; and at the same time affording to suitors the protection which results from the execution of process by the sheriff.

But it is unnecessary to point out here all the alterations which have been lately made in the practice of this court; suffice it to state, that in addition to the improvements above mentioned, others equally important have been made; and, in general, the statutes and rules for regulating the practice of the courts at Westminster, have been adopted by this court, wherever from the peculiarity of its constitution, it admitted of such alteration: and as uniformity in the practice of all courts is highly desirable, it has been provided by statute 4 and 5 W. IV., c. 62, s. 34, Provision for the uniformity of Proceedings. "that whenever by any act of parliament, or by, or under the authority of any act of parliament, or by any rule or order of any of his Majesty's superior courts at Westminster, or of any of the judges of the same, any rules, orders or regulations, shall be made for the purpose of framing, regulating, or amending the proceedings, practice or pleadings, of any of the said superior courts at Westminster, it shall be lawful for the judges of the court of common pleas at Lancaster, or any two of them, by rule or order to be made in that behalf, to adopt *mutatis mutandis*, all or any of such rules, orders, or regulations, or any part or parts thereof, as to the said last mentioned judges shall seem fit."

Having thus glanced at the modern improvements in the practice of the court, we would remark in concluding these introductory observations, that notwithstanding other similar establishments, in a neighbouring county, have been abolished, yet the court of common pleas at Lancaster, from the superior excellency of its constitution, seems to have acquired a permanent character: and from the ready access to it at all times, and the simplicity, economy, and

expedition of its procedure, it may well be ranked among the most valuable tribunals of justice in the kingdom. It is true, indeed, that the causes of its establishment, have long since happily ceased; but still, there are reasons equally urgent for its preservation: for if, in former times it was deemed expedient to give to the county of Lancaster a domestic judicature, for the purpose of keeping the people at home, to resist the frequent aggressions of their predatory neighbours, it is equally important now, for the interests of this great commercial and populous county, that its inhabitants should "retain its local jurisdiction and judicial establishment," as a means of obtaining cheap, speedy, and at the same time, effectual justice. It is pleasing to contrast our present condition, with that of our ancestors, at the period when the palatine jurisdiction was created. Then the ancient castle of Lancaster, with its encircling moat and embattled towers, stood on its lofty eminence, as forbidding the hostile approach of our northern neighbours. Now we regard those neighbours as friends, and the county palatine of Lancaster, favored with the due administration of good laws in her own courts of justice, invites the people of all countries to her shores, and receives them under her protection.



BOOK I. CHAP. 1.

OF THE NATURE AND JURISDICTION OF THE COURT OF
COMMON PLEAS AT LANCASTER.

The court of Common pleas at Lancaster is recognised ^{Jurisdiction.} as one of the superior courts of the kingdom (a); and possesses throughout the county, a concurrent jurisdiction with the courts of common law at Westminster, in all per- ^{Concurrent.} sonal actions, and actions of ejectment.

The jurisdiction of the court in all actions, except those against attorneys and officers of the court, was primarily founded on an original writ, issued, not from the chancery of England, (there being no curiaitor there for the issuing of such writs into counties palatine) but from the chancery of the county palatine, and returnable before the justices of the common pleas at Lancaster (b).

In all cases, therefore, where an original writ from chan- ^{Exclusive.} cery, was necessary to support the proceedings of a superior court, this court has possessed within the county an *exclusive* jurisdiction, as in all *real* actions for lands within the county: and consequently, in the levying of fines and suffering of recoveries of such lands. In personal actions the original writ, though supposed to be issued, yet rarely in fact was so in modern times, except in proceedings against corporations within the county, which, until the 4 and 5 W. IV. c. 62, must necessarily have been commenced by original, issued from the chancery of the county palatine; and therefore, this court in such cases had *exclusive* jurisdiction. In all other personal actions, the courts at Westminster have for a long time exercised within

(a) 1 Saund 74.

(b) See 1st Report of the Commissioners appointed to inquire into the practice of C. P. L., page 7.

the county a jurisdiction, concurrent with that of the court of common pleas at Lancaster, having it is said, acquired such community of jurisdiction from the following circumstances:

1. By the disuse of pleas to the jurisdiction of the courts at Westminster. 2. By those courts allowing a plaintiff, in a transitory cause of action, arising within the county palatine, to proceed by *testatum capias*, laying the venue in another county; and not allowing the defendant to change the venue to the county palatine, without his undertaking not to assign for error, the want of an original. 3. By the practice of the courts at Westminster, in entertaining original jurisdiction, without the aid of an original writ (c).

By the abolition of fines and recoveries (d), and the substitution of the summons and *capias* for the original writ, in the commencement of personal actions, very little remains of this court's exclusive jurisdiction, which is now confined to the few remaining instances of *real* actions for lands within the county (e).

What necessary
to give the Court
Jurisdiction

In order to give this court jurisdiction in personal actions, it is not necessary that the cause of action should arise within the county, nor that the plaintiff should reside there. If the defendant be amenable to the process of the court by his person or effects, it is sufficient (f).

Its appellate and
superior Juris-
diction.

This court is a court of appeal from the decisions of inferior courts within the county, by writ of error, or false judgment; and proceedings are removable from inferior courts of record within the county, by writ of *certiorari*, or *habeas corpus cum causa*, and from courts not of record, by writ of *pone loquelam*, *recordari facias loquelam*, or *accedas ad curiam*.

(c) 1st Report of the Commissioners of C. P. L., page 3.

(d) By Stat. 3 and 4, W. 4, c. 74.

(e) The Stat. 3 and 4, W. 4, c. 27, s. 36, abolished all real and mixed actions, except the writ of right of dower, writ of *dower unde nihil habet*, *quare impedit*, and ejectment. These actions, except that of ejectment, must still be commenced by original writ; and the action of ejectment may be brought in the same manner as formerly. See Tidd's pr. (1833) p. 62.

(f) 1 Bac. Ab. Tit. Courts Palatinate. 1 Saund 74. Evans's Pr C. P. L. page 3.

Proceedings are removable from this court to the King's Bench, by writ of *certiorari*, but such removal is not allowed without a special ground for it (*g*) ; and a writ of error lies from this court to the King's bench, for although this is a superior court, yet its jurisdiction is derived from the crown (*h*).

An injunction to stay proceedings in this court may be had from the Chancery of Lancashire, which has a concurrent jurisdiction with the high court of Chancery, in granting such injunctions, where the litigant parties are resident within the jurisdiction (*i*).

In causes sent from the courts at Westminster for trial in a county palatine, instead of the common writ of *venire facias*, there is a special writ of *mittimus*, directed to the justices there, commanding them to issue the jury process, and when the cause is tried, to send the record back to the court above.

The Process of the Court cannot be executed out of the county, except only the writ of *subpoena*, which by statute 4 and 5, W. 4, c. 62, s. 29, may be served in any part of England or Wales.

The statute just referred to, has also given a greater efficacy to the proceedings of this court in two other important particulars : the one, where a plaintiff, or defendant, against whom a judgment is recovered, shall remove his person or goods out of the jurisdiction ; in which case any of the courts at Westminster is empowered to issue an execution into any county, upon a certificate from the Prothonotary of the amount of such judgment (*j*) : the other, where parties against whom it is desired to enforce rules of this court, are resident out of its jurisdiction ; in which case upon a certificate of the rule by the Prothonotary, and an affidavit that by reason of such non-residence,

(*g*) See post B. 5, ch. 2.

(*h*) See post B. 5, ch. 18.

(*i*) *Cheetham v. Crook and others*, 1 M'C. and Y. 307.

(*j*) 4 and 5, W. 4, c. 62, s. 31.

the rule cannot be enforced, it may be made a rule of any of the courts at Westminster, and enforced as such (k).

Forms of proceedings.

Assimilating the practice to that of the Courts at Westminster.

The forms of proceedings in this court are for the most part the same as those of the courts at Westminster. And in order to effect, as far as possible, an uniformity of practice, the judges of this court, or any two of them, are, as we have seen (l) empowered to adopt, *mutatis mutandis*, any of the rules of the courts at Westminster. But where the practice of those courts differs, and there is no rule peculiar to this court, its practice is governed by that of the Common pleas at Westminster.

(k) 4 and 5, W. 4, c. 62, s. 32.

(l) See ante pa. 10.

BOOK 1. CHAP. II.

OF THE JUDGES AND OFFICERS OF THE COURT.

The Judges of this Court were formerly limited to two The Judges.
in number, being always the two judges of the courts at
Westminster who had chosen the northern-circuit; but
by statute 4 and 5 W. 4, c. 62, s. 24, the King is em-
powered "in right of his duchy and county palatine of
"Lancaster, from time to time to nominate and appoint
"all or any of the judges of the superior courts at West-
"minster, to be judges of this court: provided never-
"theless, that the judges before whom the assizes for this
"county shall from time to time be held, and their res-
"pective officers, shall alone be entitled to the fees and
"emoluments heretofore received by the judges of the
"county palatine, and their officers." In pursuance of this
act, the King, by his letters patent, under the seal of the
county palatine, dated the 15th November, 1834, constitu-
ted all the then judges of the courts of King's Bench,
Common Pleas at Westminster, and Exchequer, judges of
this court, reserving to the two judges of the preceding
assizes, their fees and emoluments. And by another pat-
ent, dated the 3rd March, 1835, his Majesty appointed
the then lately created judges of the courts at Westmins-
ter, *Lord Abinger*, and *Sir J. T. Coleridge Knight*, to be
judges of this court.

Notwithstanding the above general appointment, the
judges of this court before whom the Assizes are holden,
are now, as heretofore, appointed by a separate commission,
under the seal of the county palatine (a), which latter
appointment is made whenever a change takes place in
the judges who go the northern-circuit.

(a) 27 H. 8, c. 24, s. 5.

By such separate commission one of the judges is constituted *Chief Justice*, and the other *Justice*, of all manner of pleas within the county palatine. No alteration in the form of such commission has taken place in consequence of the statute 4 & 5 W. 4, c. 62; and the order of his Majesty for holding the assizes at Liverpool as well as Lancaster, expressly directs that no alteration shall be necessary in such commission (b)—a copy of the judge's patent is given below (c). As all actions tried here whether commenced in this court, or transmitted by Mittimus, are tried at bar, under the authority of such commission, there is no clause of *Nisi prius* in the award of jury process; and the judges cannot be assisted in the trial of civil causes by a sergeant, as in other counties (d).

(b) See post ch. 5 of this book.

(c) Patent of the Chief Justice of the court:—

Patent of the
Chief Justice.

"William the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith. To all to whom these our present Letters shall come greeting. Know ye that we of our especial grace, certain knowledge, and mere motion, have given and granted, and by these presents do give and grant unto our right, trusty, and well-beloved, *John Lord Lyndhurst*, our Chief Baron of our court of Exchequer at Westminster, the office of *Chief Justice*, of Common Pleas, within our County Palatine of Lancaster; and the office of Chief Justice of all manner of pleas within our County palatine aforesaid, to be held, heard, and determined, to the before-named Lord Lyndhurst we give and grant by these presents; and the same Lord Lyndhurst, our Chief Justice, of Common Pleas within our County Palatine of Lancaster, and our Chief Justice of all manner of pleas within our County Palatine aforesaid, to be held, we make, ordain, and constitute by these presents: we also constitute and ordain by these presents, the before-named Lord Lyndhurst, our Chief Justice, of all manner of pleas, as well of the Crown as of Assize, Novel Disseizin, Mort d'Ancestor, Juris Utrum, Certifications, and Attaints, and other pleas whatsoever, within our County Palatine of Lancaster, which shall be arraigned or prosecuted at Lancaster, or elsewhere in the same county, to be held, heard, and determined, (which said offices by other our Letters Patent, under the seal of our County Palatine aforesaid, bearing date the 30th day of January, in the fourth year of our reign, were given and granted unto our trusty and well-beloved Sir William Elias Taunton, Knight, one of the Justices of our court before us, so long as it should please us, which our pleasure we have determined and do determine by these presents), to have, enjoy, occupy, and exercise the offices aforesaid, and every of them, unto the before-named Lord Lyndhurst, so long as it shall please us: to be taken for the premises, the Wages, Fees, and Profits, antiently due and of right accustomed, by the hands of our Receiver General, of our duchy of Lancaster, for the time being, at the usual Feasts. In witness whereof, we have caused these our Letters to be made patent. Witness ourself at Lancaster, the 16th day of June, in the fourth year of our reign."

The patent of the other assize Judge is similar in all respects, except, in constituting him "Justice" instead of "Chief Justice" of the court.

(d) Evans' pr. 6.

The chief justice usually presides in the crown court, at the assizes; and in vacation, rules and summonses are generally returnable before, and orders made by, him.

The other assize judge usually presides in the civil court; and, during the northern-circuit, rules and summonses are generally returnable before, and orders made by, him. Writs are tested in the name of the chief justice; or, in case of vacancy of such office, in the name of one of the other judges of this court. The judges have no associate; and each of them appoints his own marshal.

There is one *Prothonotary* of this court, whose office is a Prothonotary. patent office, in the gift of the crown, in right of the duchy of Lancaster. This officer unites in his own person the functions of the several clerical officers of the superior courts at Westminster: thus, he signs all writs issuing from this court, and files the same when returned. All rules (necessary in the conduct of a suit) whether to shew cause, or absolute in the first instance, or upon a judge's order, are drawn up by him. With him, appearances are entered, and special bails, declarations, pleadings, and other proceedings, filed. He files writs for the removal of causes into this court; and, returns writs of error and *certiorari*, for the removal of proceedings therefrom. Minutes of writs, declarations, pleadings, and other proceedings, are made by him, in books kept at his office: and he has the custody of all documents relating to the proceedings of this court, an account of which, is given in another place (e).

It is his business to nominate special juries; to make out writs of *venire facias* and *habeas corpora* for juries, as well for the trial of causes, depending in this court, as of those sent to be tried here, by *mittimus*; and in the latter he draws up the postea, and transmits the same to London. He also draws up and enrolls judgments and recognizances of bail; and makes official copies of fines, recoveries, and proceedings in a suit. He taxes costs between party and party, and attorney and client; and computes what is due for principal and interest, on bills, notes, bonds, mortgages, &c. He takes recognizances of

(e) See post chap. 6 of this Book.

bail, prepares commissions for taking the same, and decides (upon affidavits) as to the sufficiency, or insufficiency of bail, when objected to. There is, however, in cases of bail, a power of appeal from his decision to the judges of the court; but no instance has been known for many years of such an appeal having been made.

By the order of his Majesty for holding the assizes at Liverpool as well as Lancaster, the Prothonotary or his deputy is required to attend the assizes at both these places. In court, he calls the jury, reads documentary evidence, and takes minutes of the proceedings and decisions. He also administers the oaths of persons admitted attorneys, and enters such admissions on the roll. For a long series of years the duties of this office have been discharged by a deputy, resident at Preston.

The Sheriff.

The executive officer of this court is the *Sheriff*, who is appointed yearly, by patent, under the seal of the county palatine. Such appointment generally takes place in the month of February, and the proceeding thereon is somewhat different from that on the appointment of Sheriffs of counties not palatine; the Chancellor of the Duchy and not the judges, selecting three persons, whose names he submits to the King, as Duke of Lancaster, and the first in the list is usually appointed. The Sheriff of Lancashire is an immediate officer of this court, and is therefore subject to its jurisdiction, and punishable for contempt. He is also considered an officer of the courts at Westminster, and amenable for disobeying the process of those courts. His own attorney is generally appointed under-sheriff; and if the under-sheriff does not reside at Preston, he deposes an agent there, to discharge the duties of the office; and the sheriff or his deputy is required to attend the assizes both at Lancaster and Liverpool (ee). Bailiffs, or officers for the execution of Process, are appointed in the principal towns of the county, and act under written warrants from the sheriff, in whose office the writs are lodged: but when the sheriff is a party to the suit, this court directs its process to the coroners of the county; and if they be interested, to elisors, named by the prothonotary.

(ee) Order of the King in Council of the 24th June, 1835. See Lond. Gazette of the 26th June, 1835.

In order to prevent abuses in the execution of process, it is a rule of this court (*f*), that "if any sheriff, under-sheriff, sheriff's clerk, bailiff of liberty (*g*), or other bailiff, shall wilfully delay the execution, or return of any process, or execution; or shall take or require any undue fees for the same; or shall give notice to the defendant, and thereby the execution of any process or writ be prevented; or having levied money detain it in his hands, after the return of the writ, besides the ordinary course of amerciaments, an attachment, information, commitment, or fine, to be as the case requireth; and this as well in the case of a late sheriff, or other person before mentioned, as of them present in office." And in furtherance of this provision it has lately been ordered (*h*), that "if any sheriff's officer shall, under any pretence whatever, take from a defendant, on the execution of any bailable process, a larger sum than is allowed by this court, the sheriff shall, by an order of this court, or one of the judges thereof, be compelled to refund to the defendant, the amount of any such overcharge, together with the costs of any application that may be made for that purpose; provided such application be made, during the time such sheriff remains in office, or within a month afterwards."

The following law officers of the county palatine, though not immediately officers of this court, are yet, in some measure, concerned in its proceedings.

The Chancellor of the Duchy and County Palatine who is appointed by the King, as Duke of Lancaster, has the custody of the several seals of the Duchy, and county palatine (*i*); and also the sealing of all writs, issuing as well from this court, as from the Chancery of Lancashire;

Chancellor of
the Duchy and
County Palatine

(*f*) Reg. Gen. Sep. Ass. 1655.

(*g*) The Liberty of Furness is the only Liberty within the county, which possesses an exclusive right to the execution of process within its precincts by its own officers; but this right is at present very limited, as the Writ of *captas* to arrest now contains a clause of *non omittas*.

(*h*) Reg. Gen. (49), Mar. Ass. 2, W. 4.

(*i*) The seal of the Duchy is kept by the Chancellor's Secretary, at the office of the Duchy of Lancaster, in London, and is not used for any purposes connected with this court.

for this court has no separate seal of its own, but its process is authenticated by the seal of the county palatine (j).

Cursitors.

The Cursitors (of whom there are five), and who are also clerks, and attorneys, in the Chancery of Lancashire, are appointed by the Chancellor of the Duchy, under his hand and seal, and hold their office *quamdiu se bene gesserint*. By an arrangement among the cursitors, one of them attends to the business of the office, is called the acting cursitor, and docketts writs for the seal.

Seal Keeper.

The Seal Keeper is the county palatine secretary of the Chancellor, and holds his office during the pleasure of the Chancellor for the time being. He affixes the county palatine seal, to the writs issuing from this court.

Offices.

The Prothonotary, Acting Cursitor, Seal-keeper, and Sheriff, have each an office at *Preston*, which is open from ten o'clock in the morning, till one in the afternoon; from half-past two in the afternoon, till five; and, from six in the evening, till half-past seven. The only stated holidays besides Sundays, on which these offices are closed, are Christmas-day, and Good Friday.

The business of the public offices used to be transacted at Lancaster during the assizes, when they were held at that place only; but since they have been holden at Lancaster and Liverpool, such business has been done altogether at Preston, though the Prothonotary and Sheriff or their respective deputies, are required, as we have seen, to attend the assizes, both at Lancaster and Liverpool.

(j) The Sealing of Writs with the County Palatine Seal seems to be an anomaly, and probably arose from the same person being at some time both Prothonotary and Seal Keeper.

BOOK 1. CHAP. III.

OF ATTORNEYS.

The proceedings of this court are carried on by the Attorneys of the Court. Attorneys of the court, or their agents; and when an attorney of any of the courts at Westminster, who is not admitted in this court, practises here, he must do so in the name of an attorney of this court (a).

By an old rule (b) it was ordered that none should be admitted an attorney of this court, unless he had practised as a common solicitor for the space of five years, as a clerk to some judge, sergeant at law, practising counsellor, prothonotary, or prothonotary's clerk, officer, or attorney of this court, or the courts at Westminster; but by statute 2 Geo. II., c. 23, s. 5 & 24, no person can act as an attorney, either in his own name, or in the name of any other person, unless he shall have been bound by contract, in writing, to serve as a clerk for the space of five years (c), to an attorney duly sworn and admitted according to that act; and unless such person, during the said term of five years, shall have continued in such service (d); and also, unless such person, after the expiration of the said term of five years, shall be examined, sworn, admitted, and enrolled, as by that act is required.

(a) See Hyde v. Latham and another, 3 Tyr. 143, and Constable v. Johnson. Id. 231.

(b) Sep. Ass. 1655.

(c) An exception is created by 1 and 2, Geo. 4, c. 48, s 1, (amended by 3rd Geo. 4, c. 16,) in favour of a person who has taken the degree of Bachelor of Arts or Bachelor of Law in the University of Oxford, Cambridge, or Dublin; a service by such person under a written contract, for three years, being sufficient.

(d) As to the mode of service see infra.

Stamp duty on articles of clerkship. *The duty upon articles of Clerkship is regulated by the last stamp act (e), which imposes a duty of £60 upon articles, whereby any person shall become bound to serve as a clerk, in order to his admission in this court (f). But persons admitted in any of the courts at Westminster, may afterwards be admitted in this court, without payment of a further stamp duty; and persons admitted in this court, after service under the lower duty, may be admitted in any of the courts of the counties palatine, or in any other Court of Record in England holding Pleas where the debt or damage shall amount to 40s., (but not in the courts at Westminster), without payment of a further duty (g). Articles under which a person may have served, in order to his admission in this court, may be stamped, at any time, with the higher duty (£120), in order to his admission in any of the courts at Westminster; provided such articles shall have been previously stamped, with a stamp denoting the payment of the duty, payable in respect of the same, at the date of such articles of clerkship (h).*

An attorney of the courts of the counties palatine, and not of the courts at Westminster, cannot practice in the latter, without being also admitted there. If he do so, either in his own name, or in the name of another, he incurs a penalty of one hundred pounds; and cannot maintain an action for his fees, on such proceedings (i).

Enrolment of articles.

The articles must be enrolled or registered with the Prothonotary, together with an affidavit of their execution (j),

(e) 55 Geo. 3, c. 184, sched. p. 1.

(f) The Commissioners appointed to inquire into the Courts of the County Palatine, recommend that the duty be increased to the same amount as on articles for admission in the Courts at Westminster.

(g) 34 Geo. 3, c. 14, s. 6.

(h) 9 Geo. 4, c. 49, s. 4.

(i) 34 Geo. 3, c. 14, s. 4.

(j) In the Common Pleas at Lancaster :

G. H. of [] gentleman, maketh oath and saith that by articles of Clerkship bearing date the [] day of [] A.D. [] and made between [describe the parties as in the articles] the said [clerk] for the considerations therein mentioned, did put, place, and bind himself clerk to the said [master] to serve him in the profession of an attorney at law, from the day of the date of the said articles, for the term of five years thence next ensuing, and fully to be complete and ended; and which said articles were, in due form of law executed by the said [parties, naming them] on the

within six months after execution; or the service will be deemed to commence only from the time of enrolment (1): but, as the enrolment is often omitted, an indemnity act is occasionally passed, to cure the omission. The mode of registering the articles is by entering in a book kept for that purpose, the amount of duty paid on them, and their date—the names of the master, clerk, and witnesses to the execution—the term of service—the name of the person making the affidavit of execution—the date, when sworn—and the day of registering: the Prothonotary certifies the enrolment upon the articles. An assignment of articles is registered in like manner.

Service under articles, for the purpose of being admitted *Service* in this court, must in every respect, be the same as is required for admission in the courts at Westminster; and by statute 22, Geo. II., c. 46, s. 8, it is enacted, “that every person who shall be bound by contract in writing, to serve any attorney or solicitor, shall, during the *whole time* and *term* of service, to be specified in such contract, continue and be actually employed by such attorney or solicitor, or his or their agent or agents, in the proper business, practice, or employment, of an attorney or solicitor.” But a service for *five years*, under articles for a term of *six years*, has been held sufficient under the statute, which in a subsequent section, speaks of five years as sufficient (m); and persons bound for *five years*, and serving part of that time, *not exceeding a year*, with a barrister or special pleader, may be admitted (n).

The Admission of attorneys in this court takes place at Notice of Ad-
the assizes only; and it is ordered by rule of Lent assizes, mission.

day of the date of the same; and that the several names [copying the signatures] set and subscribed opposite the several seals affixed to the said articles, as the parties executing the same are of the respective proper hand writing of the said [parties, naming them], and were written and subscribed in the presence of this deponent, and [the name and addition of the other attesting witness, if any]; and that the names of G. H. and [] set and subscribed to the said articles, as witnesses to the due execution thereof, are of the respective proper hand writing of this deponent and the said [] Sworn, &c. G. H.

(1) 34 George III, c. 14, s. 2.

(m) Per Bayley and Holroyd Just. *Ex parte Backhouse*, one, &c. Mar. Ass. 1825.

(n) 1 and 2, George IV, c. 48, s. 2, and see *Supra* as to persons who have taken degrees at the Universities.

50 Geo. 3, that "when any person intends to apply for such admission, and who shall not have been admitted an attorney or solicitor, of any other court, he shall, for the space of *one full term*, previous to the assizes, in which he shall apply to be admitted, cause his name and place of abode, and also the name, or names, and place, or places of abode, of the attorney or attorneys (o) to whom he shall have been articulated, written in legible characters, to be publicly put up, in the Prothonotary's office, in Preston, in such place as public notices are usually put up in; and also enter, or cause to be entered, in a book, to be kept for that purpose, at the Prothonotary's office in Preston, his name, and place of abode, and also the name, or names, and place, or places of abode, of the attorney, or attorneys, to whom he shall have been articulated; and also at the assizes, in which such person shall apply for admission, as an attorney, he shall, at least, *three days* (exclusive) before the granting of a fiat for such admission, leave, or cause to be left, at the judge's lodgings in Lancaster (p); and also fix up, or cause to be fixed up, in some conspicuous and convenient place, in open court, his name, and place of abode, and also the name, or names, and place, or places of abode, of the attorney, or attorneys, to whom he shall have been articulated; and shall also before he be admitted an attorney of this court, file with the Prothonotary of this court, or his deputy, an affidavit of the notices having been given, pursuant to this rule."

The terms' notice required by this rule, (the form of which notice is given below (q),) must be put up in the Protho-

(o) The name of the attorney to whom the clerk may have been assigned, must be named in the notice. Exp. Stokes, 1 Chitt. rep. 556. Exp. Dobson, 2 Dow. P. C. 539.

(p) No provision has yet been made for leaving such notice at the judge's lodgings, at Liverpool, but it is conceived that a notice left there would suffice.

(q) Notice is hereby given, that G. H. of Preston, in the county of Lancaster, now (or late) under articles of clerkship to A. B. of Preston aforesaid, attorney at law, [or, *if the articles have been assigned, then add* "and afterwards by assignment of such articles to E. F. of [] in the said county, attorney at law,"] intends to apply at the next General Session of Assizes, to be holden at Lancaster, [or Liverpool] in and for the county of Lancaster, to be admitted an attorney of his Majesty's Court of Common Pleas at Lancaster.—Dated this [] day of [] 1836.

tary's office, for the term next immediately preceding the Assizes, at which the application is to be made for admission (*r*), and should be put up before the first day of such Term (*rr*).

The notice required to be left at the Judges' lodgings, is usually put up in a place there appropriated for notices; and a copy of it is also affixed in the Nisi prius court.

For a re-admission, the same notices must be given, as on a first admission (*s*), unless the re-admission be rendered necessary, in consequence of the neglect of the agent, to renew the certificate (*t*). Notice of re-admission.

The requisite notices having been given, the party must be prepared with certain affidavits, before he applies for the Judge's Fiat.

The Affidavits necessary on a first admission, are, that the applicant has duly served his clerkship—that notices of admission, have been given, and the proper entry has been made at the Prothonotary's office, pursuant to the general rule, before mentioned (*u*)—and that the stamp

(*r*) Exp. Bonner, 6 Taunt. 335 (*rr*); Exp. Gordon, 2 Dow. P.C. 470.

(*s*) Exp. Leeming, Aug. Ass. 3 W. 4. Bolland B.; but it has lately been determined in the Courts at Westminster that a notice of re-admission put up at the opening of the office, on the first day of Term, is sufficient. See Exp. Senior, 1 Dow. P.C. 517. See also Exp. Pilkins, 2 Id. 203.

(*t*) Tidd's Pr. (9th Ed.) 79; and on what terms a re-admission will, in general, be allowed, See Id.

(*u*) In the Common Pleas at Lancaster:—

C. D. of [] in the county of Lancaster, Gentleman, and E. F. of [] in the said county, Gentleman, severally make oath and say, and first vice under Ar- this deponent C. D. for himself saith, that in pursuance of the articles of Clerk- clerkship hereto annexed, bearing date the [] day of [] 18 [], ship, and of giv- put up at the opening of the office, on the first day of Term, is sufficient. See Exp. Senior, 1 Dow. P.C. 517. See also Exp. Pilkins, 2 Id. 203.
B., of [] in the said county, Gentleman, one of the attorneys, &c. admission, &c. [describing him as in the articles] as his clerk, in the practice of an attorney and solicitor, from the day of the date of the said articles inclusive, to the [] day of [] 18 [] inclusive, being the full term of five years. [Stamp 2s. 6d.]
And this deponent E. F. for himself saith, that he did before the commencement of [] Term now last past, affix a notice, written in legible characters, in the office of the Prothonotary of this honorable court, in Preston, in the said county, in such place there as public notices are usually put up in, which notice contained the name and place of abode of the said C.D. and also, the name and place of abode of the said A.B. and purported that the said C. D. intended to apply at the then next, and now

duty on the articles was paid (v). The affidavit of execution of the articles (which is filed with the Prothonotary as before mentioned,) or an office copy thereof, must be produced. The enrolment of the articles and of the assignment, if any, must be shewn; which will appear as well from the Prothonotary's certificate indorsed thereon, as from the book, in which they are registered. The articles must also be produced; and it is advisable to have

present, Assizes, to be admitted an Attorney of his Majesty's court of Common Pleas at Lancaster. And this deponent further saith, that he did also before the commencement of the said term, enter in a book kept for that purpose, at the said Prothonotary's office, in Preston, the name and place of abode of the said C. D. and also, the name and place of abode of the said A. B. and that he this deponent, did, on the [] day of [] instant, *[which must be 3 days exclusive before the granting of the fiat]* leave a notice at the Judges' lodgings in Lancaster [or Liverpool], and also affix a notice in a conspicuous and convenient place in open court there, in the place where notices are usually affixed, each of which last-mentioned notices, contained the name and place of abode of the said C. D. and also, the name and place of abode of the said A. B. and purported that the said C. D. intended to apply at the present assizes, to be admitted an Attorney of the said Court of Common Pleas at Lancaster. And this deponent further saith, that the first-mentioned notice remained so affixed from the time of affixing the same during the whole of the said term, to the best of this deponent's knowledge and belief; and that the said other notices remained so affixed and entered, from the said respective times of affixing and entering the same, to the time of making this affidavit as this deponent verily believes; and that if the said notices, or any, or either of them, were, or was afterwards removed, cancelled, or defaced, it was done without the privity or consent of this deponent.

Sworn at [] by the said C. D. and E. F., &c.

C. D.

E. F.

Note.—If the affidavit of service and of affixing notices, &c. be made by the same person; or if there has been an assignment of the articles; or if the clerk has served part of the time with a Barrister or Special Pleader, the above form must be varied accordingly.—See the variations, Chitty's forms, pa. 6 and seq., and Tidd's forms, Appendix to prac. (1838) pa. 256 and seq.

Affidavit of payment of duty.
[To be engrossed on a separate stamp.]

(v) In the Common Pleas at Lancaster:—

C. D. of &c., maketh oath and saith, that the stamp duty of sixty pounds [or £120.] was paid in respect of certain articles of clerkship, bearing date the [] day of [] 18 [], and made between *[state the parties, and their residence]* as appears by the stamp impressed on the said articles; and that the said articles were duly executed by the respective parties thereto, on the day of the date thereof; and were duly registered on the [] day of [] 18 [], as appears by the certificate of the proper officer indorsed thereon.

Sworn, &c.

C. D.

**Note.*—If the articles have been assigned, here state the payment of the duty upon, and the execution and registration of, the assignment; as above stated, respecting the articles.

the master's certificate of service indorsed (w), if he does not accompany the applicant, or join in the affidavit of service.

When an attorney of any other court, or a solicitor of the court of chancery, applies for admission here, the notices and affidavits before mentioned, are not required; nor is it necessary previously to enrol the articles of clerkship in this court. But the applicant must produce his former admittance, together with an affidavit stating the time of such admission, that he is the same person, as therein mentioned—that he continues to practise, under it—and that he has regularly taken out his certificate. If however, the former admittance be of recent date, the party will only be required to produce, along with it, an affidavit of identity. Affidavit after a former admission.

The fiat for admission is obtained from the Judge who presides on the civil side of the court, who, if he thinks proper, will examine the applicant as to his fitness; but if the party be introduced to the Judge by a respectable practitioner, known to his Lordship, a fiat is usually granted without examination as to capacity. Fiat for admission.

When the fiat is obtained, it is delivered to the Prothonotary, together with the articles, which he files (x). The applicant must attend the court, at its sitting in the morning, for the purpose of being sworn; and should previously prepare his admittance, the proper form of which may be had from the Prothonotary. If the person applying, be already admitted in one of the Courts, mentioned in Stat. 2, Geo. 2, c. 23, his admission here is engrossed upon plain parchment; but if not so admitted a stamp of £25 is necessary (y). The admission is signed by the Judge, and afterwards entered by the Prothonotary, in a roll, or book, kept by him for that purpose. Admission and enrolment.

(w) "I do hereby certify that the within named [] hath well and truly served me, for the term of five years, pursuant to the within articles; and that he is a respectable person, and fit and proper to be admitted an Attorney of his Majesty's Court of Common Pleas at Lancaster.—
Dated, &c.

(x) This was ordered at the Mar. Ass. 1826, in re. Whitehead one, &c. and the Court directed articles to be filed in future. Hullock B.

(y) 55 Geo. 3, c. 184. Sched. part 1.

pose, which is subscribed by the attorney. The Prothonotary certifies the enrolment on the admittance, and states, that the admission is upon articles on which the lower duty only, has been paid, if such be the fact (z). When an attorney is re-admitted, it is so marked, on the former admittance; as "re-sworn, re-admitted," &c. and the admission may be on the same stamp, though the duty may have been raised since the former admission (a):

Certificate.

The annual certificate to entitle an attorney to practise in this court, is subject to the same stamp duty, and must be taken out at the same time, as the certificates of attorneys of the courts at Westminster, practising beyond the limits of the twopenny post; and the same *penalties* and *disabilities* are incurred in the one case as in the other, by the omission to take out or enter the certificate. The proper officer of this court to enter the certificate, is the Prothonotary.

Duties, &c. of Attorneys.

The duties of attorneys of this court, their disabilities and responsibilities, their rights and privileges, and the remedies for recovering their fees, are the same as those of attorneys of the courts at Westminster. Thus—an attorney of this court is not to allow an unqualified person to act in his name (b); he is not to be lessee in ejectment, nor bail for any defendant (c); he is not to commence or prosecute any action while in gaol (d); nor is he or his clerk, to swear deponents to affidavits, (except for the purpose of holding to bail) in causes in which he is concerned as the plaintiff's attorney (e); he cannot be a commissioner for taking special bails in this court (f), or the courts at Westminster (g).

Disabilities

(z) Ordered to be stated in future. Re Pickering one, &c. Mar. Ass. 56 Geo. 3. Le Blanc. J.

(a) Exp. Shaw one, &c. and Gill one, &c. Lent Ass. 1824, Holroyd J.

(b) 2 Geo. 2, c. 23, s. 17, and 22 Geo. 2, c. 46, s. 11.

(c) Reg. Gen. Sep. Ass. 1655.

(d) 12 Geo. 2, c. 13, s. 9.

(e) Reg. Gen. (4) Mar. Ass. 2 W. 4.

(f) 34 Geo. 3, c. 46. See post pa, 35.

(g) 4 W. & M. c. 4, s. 1.

He is privileged from serving on juries, inquests (*h*), or Privileges. other offices, where personal service is required; and from payment of office-fees, in certain cases, in which he is plaintiff: he is not liable to arrest, for although the privileges of an attorney to sue in his own court by attachment of privilege, and to be sued by bill, are taken away by Stat. 4 and 5, W. IV., c. 62, yet that act still reserves his privilege, of freedom from arrest (*i*); he can therefore, only be sued by serviceable process; and, it is supposed by some, that he still retains the privilege of being sued in the court of which he is an attorney (*j*). An attorney does not now, as he did formerly, lose his privilege from arrest, by being sued with an unprivileged person, because under the act 4 and 5, W. IV., c. 62, there is a means by which one defendant may be arrested, and another served with the same process (*k*). With respect to the rule that "privilege takes away privilege," it would seem that before the Stat. just referred to, an attorney of the King's Bench might be arrested on an attachment of privilege, issuing out of this court, at the suit of an attorney thereof (*l*). The privileges of an attorney being confined to such as practise, it is a rule of this court (*m*), that such attorneys as shall not attend their employment for a year, unless hindered by sickness, or necessary absence, shall not be allowed the privilege of attorneys for the future. An attorney of this court may obtain a commission for swearing affidavits in the court of King's Bench (*n*).

The taxation of costs as between attorney and client, being under the same statutes (*o*) which regulate taxations, in such cases, in the courts at Westminster, is subject to the rules of those courts, as to the delivery of the bill, the costs of taxation, and as to what bills are of a taxable

Taxing Costs as
between Attor-
ney and Client.

(*h*) 6 Geo. 4, c. 50.

(*i*) Sect. 1 & 14.

(*j*) See Tidd's Pr. (1833) 65. Chap. K. B. Pr. 2 Addenda 75; but see Atherton's Tr. pa. 11.

(*k*) Keep v. Biggs, & an. 2 Dowl. P. C. 278. Mestayer v. Biggs, Id. Pitt v. Pocock, & an. 2 C. & M. 146. 4 Tyr. 85 S. C.

(*l*) Hopkins one, &c. v. Ferrand one, &c. 1 Y. and J. 204, (n.a.) Tidd's Pr. (9th Ed.) 83. See also 9 Pri. Ex. 16.

(*m*) Reg. Gen. Sep. Ass. 1655. See also Anon. 1 Dow. P. C. 208, 4 M. & P. 810 S. C.

(*n*) Rule of E. T. 4 Geo. 4. See 1 B. and Cr. 656.

(*o*) 2 Geo. 2, c. 23, s. 23, (made perpetual by 30 Geo. 2, c. 19, s. 75.)

nature; but with regard to the mode of procuring such taxation, it has lately been ordered (p), that "the Prothonotary "of this court, or his deputy, shall have power to grant a "rule absolute in the first instance, to tax any bill of costs "delivered by an attorney to his client, upon the usual "undertaking, provided an application be made for such "rule, within twenty-eight days after the delivery of the "bill." As however, such rule can only be had within a month after the delivery of the bill, when that period has elapsed, the client must proceed by summons and order, on the usual affidavit and undertaking; and on the order being made a rule of court, the Prothonotary grants an appointment to tax. A copy of the rule and appointment, must be served on the attorney or his agent; and, if he neglect to attend the taxation, the Prothonotary will proceed *ex parte*, on the first appointment (q). When the bill is taxed, the attorney's remedy for the amount, is either by action, or attachment upon the rule: and if he has been overpaid, the court will oblige him to refund the surplus, which, it seems, cannot be recovered by action (r).

Taxing Costs of
Process when
over-charged.

The proper course to be taken by a defendant, in order to procure and tax the bill of an attorney, who has charged too much for bailable or serviceable process, is stated in another place (s).

Lien.

The *lien* of attorneys of this court, is commensurate with that of the attorneys of the courts at Westminster; and it is provided by Rule (33) of March Assizes, 2, W. IV, that "no set-off of damages or costs between "parties, shall be allowed, to the prejudice of the attorney's *lien* for costs, in the particular suit against which "the set-off is sought; provided nevertheless, that interlocutory costs, in the same suit, awarded to the adverse "party may be deducted." Upon this rule it has been held, that a set-off of judgments will not be allowed without satisfying the attorney's *lien*, even though the judgments may arise out of the same award (t).

(p) Reg. Gen. (37), Mar. Ass. 2 W. 4.

(q) Reg. Gen. (5), Aug. Ass. 2 W. 4.

(r) Gower v. Popkin, 2 Stark. Rep. 85.

(s) See post B. 2 ch. 1, s. 1.

(t) Domett v. Heyler, and Heyler v. Domett, 2 Dowl. P. C. 540.

As the official business of this court is transacted at Agents. Preston, it is expedient that an attorney residing elsewhere, should employ an agent there, to conduct the proceedings; and such agent must, in every respect, be qualified to act as an attorney. His business is, to issue the process, and file the proceedings, in actions. In general, notice of those things done at Preston, must be given to the opposite agent there (u); and demands of pleadings must be made from him (v).

When the principal is not admitted an attorney of this court, the name of his agent (being an attorney thereof), is, as we have seen, inserted in the proceedings; and he does not incur any penalty for allowing his name to be thus used; provided the principal is duly authorised to practise in any other court of record.

The duties, rights, and responsibilities of Preston agents, are, for the most part, the same as those of the agents in London (w).

(u) Some notices may be given either to the Attorney or Agent, as Notices of Trial and Inquiry, and countermands of such notices. See Barnes, 306.

(v) See Impey's Pr. C. P. 281.

(w) See Tidd's Pr. (9th Ed.) 96-97, 1 Arch. Pr. (by Chitty), pa. 31.

BOOK 1. CHAP. IV.

OF COMMISSIONERS FOR TAKING AFFIDAVITS AND
SPECIAL BAILS.

Commissioners
to swear Affi-
davits.

Before the statute 17 Geo. 2, c. 7, much inconvenience was felt for want of commissioners to swear affidavits in this court, and that act therefore provides that the Chancellor of the Duchy and county palatine of Lancaster, or his Vice-chancellor of the county palatine, may, by commissions, under the seal of the county palatine, empower what and as many persons as shall be thought necessary, to swear affidavits concerning any cause, matter, or thing, depending, or in anywise concerning any of the proceedings, in this court, and the other courts of the county palatine, therein mentioned.

Who may be ap-
pointed.

This act does not confine the power of granting such commissions to persons, residing in England; and commissions have been granted to persons living in Ireland (a). But the Vice-chancellor has of late refused commissions to any but Attorneys, or persons in official situations, such as Judges', or Prothonotary's clerks.

Mode of ap-
pointment.

The fiat for the commission is obtained from the Chancellor or Vice-chancellor of Lancashire, by one of the Cursitors there. The commission is made out on a 10s. stamp, by the acting Cursitor, and is afterwards sealed; and the Cursitors are required by the act, to enter in a book, to be kept for that purpose, the name of the commissioner, and the date of the commission.

(a) Exp. Gregg one, &c. of Dublin, Commission dated June, 1834; and Exp. Hitchcock one, &c. of Dublin, Commission dated 30th Oct. 1834.

Commissioners for taking special bails in this court, are appointed by virtue of Stat. 34, Geo. III. c. 46, before which statute, such bails could not be taken but by one of the Judges, or the Prothonotary. By that act, however, the Chancellor of the duchy and county palatine, or his Vice-chancellor, may empower such and so many persons (*other than common attorneys or solicitors*) as shall be thought fit, to take recognizances of bail in any action depending in this court, in such manner and form, as special bails are usually, or by law ought to be, taken. Such commissioner cannot, however, take bail in error.

Commissioners
to take Special
Bails.

Who may be ap-
pointed.

The person wishing to become a commissioner to take bail, must procure a recommendation from respectable individuals, (as magistrates, clergymen, or solicitors): and it is proper for the persons so recommending, to certify the want of a commissioner at the place where the applicant resides. The recommendation is left with a clerk in court, who procures the fiat of the Chancellor or Vice-chancellor for the commission. The fiat is directed to the Prothonotary, who prepares the commission (on a 10s. stamp), which is afterwards sealed: the Prothonotary gives written instructions for the commissioner how to take bail, together with forms of affidavits of caption and justification; and enters in a book kept for that purpose, the commissioner's name, residence, and addition.

Mode of ap-
pointment.

BOOK 1. CHAP. V.

OF THE ASSIZES—RULE DAYS—AND RETURNS.

SECT. 1.—THE ASSIZES.

The sittings of this court for the dispatch of business are held during the assizes; as those of the courts at Westminster, are held during the terms.

Order in Council for holding at Liverpool as well as Lancaster, the Assizes and Sessions generally.

The assizes for the county palatine were, as we have seen (a), for a long time held exclusively at Lancaster; but the King, by an order in council, made on the 24th June 1835, in pursuance of the stat. 3 and 4, W. IV. c. 71, directed "that the assizes and sessions held under commissions of gaol delivery and other commissions, for the dispatch of civil and criminal business for the county palatine of Lancaster, theretofore holden at Lancaster, should be thereafter holden on the same circuit, both at Lancaster and Liverpool, in the said county palatine;" and, "that the said county should be divided for that purpose, into two divisions, which should respectively be called the Northern Division and the Southern Division; and, that such *Northern division* should include the whole of the several hundreds of *Lonsdale, Amounderness, Leyland, and Blackburn*; and, "that such *Southern division* should include the whole of "the respective hundreds of *Salford and West Derby*."

Although the assizes are directed to be holden at Liverpool as well as Lancaster, yet, from certain provisions contained in the above order, it would seem that the holding at either place, is to be deemed an assize for the whole county. Thus, the Grand Jury are to be summoned and

(a) Ante pa. 7.

sworn "for the body of the whole county":—the petty jurors are to be selected out of the general list of jurors (b)—the form of the assize writ in the appendix, to the order, recites the appointment of "a general session of assizes of oyer and terminer and general gaol delivery for the county palatine of Lancaster," to be held at the court-house in Liverpool—and it is declared by the order "that nothing therein contained shall extend to prevent the commissioners of oyer and terminer and gaol delivery, or justices of the common pleas within the said county, or the grand or petty juries, sitting either at Lancaster or Liverpool, from having and exercising in either place, such jurisdiction as belonged to them by law over the whole county."

Judges & Juries sitting at Lancaster or Liverpool to have jurisdiction over the whole county.

The order contains several regulations touching the proceedings in criminal as well as civil business; but, as respecting the latter, similar provisions are made for the court of Common Pleas at Lancaster, by another order dated the 25th June, 1835, a copy of the latter is subjoined. His majesty by such further order, after reciting the stat. 3 and 4, W. IV., c. 71—the regulations made in pursuance of it above referred to; and the expediency, as far as relates to the civil business to be transacted at the assizes to be so held at Lancaster and Liverpool, of making further regulations touching the Court of Common Pleas at Lancaster, proceeds as follows:—

"We do therefore order and direct that the court of Order of the King for holding the Court of C.P.L. at Lancaster & Liverpool.
Common Pleas for the said county heretofore held at Lancaster, shall be holden both at Lancaster and Liverpool, at the respective times fixed for the holding of the said assizes and sessions; and that the said county palatine be divided for the purpose of the trial of civil actions, and the transaction of other civil business in the said court, into the two divisions aforesaid."

"And we do further order and direct, that every declaration hereafter to be filed or delivered in any action in the said Court of Common Pleas, shall have in the margin, besides the ordinary venue, the words 'Northern Division,'
Declarations to specify in the margin the division of the county.

(b) As to that part of the order relative to Jurors, see post B. 2, ch. 13.

"or 'Southern Division,' but no other alteration from the ordinary form shall be necessary, and issues arising in such actions, if tried at the assizes, shall accordingly be tried at the assizes held at Lancaster and Liverpool respectively."

Where the Venue is local the trial is to be in the division where the Cause of Action arose.

"Provided nevertheless, and we do further order and direct, that in all cases of civil actions in the said Court of Common Pleas, in which the venue is by law local, the Issues therein shall be tried at Lancaster, in cases where the cause of action shall have arisen in the Northern Division; and at Liverpool where the cause of action shall have arisen in the Southern Division, in like manner as if the two divisions were two separate counties; and the declarations in such actions shall have in the margin, in addition to the ordinary venue, the words 'Northern Division,' or 'Southern Division,' as the case may require, but no other alteration from the ordinary form shall be necessary."

Power to order a trial in the division where in the Cause of Action did not arise.

"Nevertheless, it shall be lawful for the said Court of Common Pleas, or any Judge thereof, to order such issues to be tried at the assizes held in the division in which the cause of action did not arise, if they or he shall think fit; and also to order the words in the margin to be amended in all other cases in actions in the said Court of Common Pleas, so as to cause the trial to take place at the assizes held in another division."

Where no division is stated in the margin of the declaration the trial to take place at Lancaster, unless otherwise ordered.

"And we do further order and direct, that in all cases of issues already joined, or hereafter joined, in the said Court of Common Pleas, in which the venue is laid in the county of Lancaster, without any words in the margin specifying the division of the county, such issues shall be tried at Lancaster, unless the said court, or a Judge thereof, shall otherwise order, by directing the proper words to be inserted in the margin, or otherwise, as he shall think fit."

Prothonotary to attend the assizes.

"And we do further order and direct, that the Prothonotary, or his deputy, shall attend at the assizes both at Lancaster and Liverpool."

"And we do further order and direct, that no alteration shall be necessary in the commission or commissions appointing the Chief Justice, or other justices of the Court of Common Pleas, and of all manner of pleas within the said County; and that the Jury-process, on issues joined in the said Court of Common Pleas, and Subpoenas, do name the assizes either at Liverpool or Lancaster, as the case may be, at which attendance is to be given: and writs of Subpoena to be hereafter issued for the next assizes, may be tested on any day after the date hereof; and, for any subsequent assizes, may be tested in manner heretofore used and accustomed."

No alteration in the Judges' Com-missions necessary.

Jury Process & Subpoenas, to specify the place at which attendance is required.

"And we do further order and direct, that all and every other the said regulations already made by us, by and with the advice of our privy Council, so far as they relate to or affect the said Court of Common Pleas, or the jurisdiction of the judges thereof, or the trial of issues therein, or the Court of Pleas of the Crown for the said County, be carried into effect (c)."

In pursuance of the above orders, the August assizes 1835, were holden at Lancaster and Liverpool, commencing at the former place on the 12th, and at the latter on the 15th. Both judges attended at Lancaster, where the commission was opened, and the business gone through, as usual. The judges then proceeded to Liverpool, where no commission was opened; but, in other respects the same forms were observed, as at Lancaster.

It appears that until the year 1806, the Spring assizes for this County were attended by one judge only (d); and before that period the practice was to enter the name of the Chief Justice of the King's Bench (e) on the rolls at such assizes, as the Chief Justice of this Court; though the other judge alone then went the circuit. The Chief Justice usually presides on the Crown-side, and the other judge on the Civil-side.

Before whom the Assizes are held.

(c) See London Gazettes of the 26th and 30th June, 1835.

(d) See appendix to Evans' Pr. C. P. L. page 154 (Note).

(e) Lord Mansfield's name appears on the Rolls at the Spring Assizes, from 1757 to 1788; Lord Kenyon's, from 1789 to 1802; and Lord Ellenborough's, from 1803 to 1805.

Assize Circular. The time of holding the assizes is fixed about the close of Hilary and Trinity-terms, by the two assize judges, who may begin the circuit, at any of the counties in their route, at their discretion (*f*) : and as soon as the time of holding the Assizes is known, a Circular is issued from the Prothonotary's office, stating such time ; and also the Rule days, before and after the Assizes ; the time for ordering Records ; for declaring against prisoners in gaol, on arrest ; and for witnesses in causes in the different lists, to be in attendance (*g*).

Course of Circuit. As the Assizes at every place in the Circuit, except the last, must necessarily be limited in duration, it used frequently to happen at York, at which place the sittings generally preceded those at Lancaster, that causes were made *remanets*, for want of time to get through the business ; to prevent this inconvenience, the Judges at the March Assizes, 1824, took Lancaster in their route before York ; and for the same reason it was then determined, that in future, the counties of York and Lancaster should be taken alternately before each other.

Opening the Commission after the day appointed. Formerly, if the Judges, or one of them, did not arrive in time for opening the Commission, on the day appointed, it was necessary to get it renewed : the procuring of which was the occasion of delay, and inconvenience ; to remedy which, it is provided by Stat. 3, Geo. 4, c. 10, that whenever, in case of a pressure of business at other places, or from other unforeseen circumstances, it shall so happen that the Commission shall not be opened, in the presence of one of the quorum Commissioners, at any place specified for holding the Assizes, on the very day appointed for such purpose, it shall be lawful to open the same, in the presence of one of the quorum Commissioners, on the following

(*f*) The places of holding the Assizes on the Northern-circuit, are York, Durham, Newcastle, Carlisle, Appleby, Lancaster, and Liverpool.

(*g*) Owing to the uncertainty as to what would be the routine of business at the last Assizes (*h*), the Circular did not state the time when the Witnesses were to be in attendance ; but it is conceived, that in future, this will be done, so far, at least, as regards the Southern Division of the County.

(*h*) August, 1835.

day; or if that shall be a Sunday, or other day of public rest, then on the succeeding day; and such opening to be as effectual, as if the same had been on the very day appointed for that purpose, and to be deemed an opening on the day for that purpose appointed: and all Records, and other proceedings, under or relating to any Commission, which may be opened by virtue of that act, may be drawn up, entered, and made out, under the same date, and in the same form, in all respects, as if such Commission had been opened, on the day originally appointed for that purpose.

But as there is no Commission opened for the Common Pleas at Lancaster, (the Court sitting *in Banco*, and considering the five Commission days as a Term,) it would seem that before this Statute, the Assizes would not have been lost, so far as this Court is concerned, by the non-attendance of the Judges on the day fixed for opening the Commission.

The first five days of the Assizes (exclusive of Sunday) are called *Commission Days*; and the last of them is considered the end of the Assizes; though the actual sitting of the Court for the trial of Causes, has of late years, usually occupied ten days, or a fortnight. Commission days.

The *first* Commission day, is the time appointed for casting *Essoigns*, in real actions. It used also to be the teste of all mesne Process, subsequently issued; and a general return day, for all kinds of Process. On the *second* Commission day, it was formerly the practice to make Writs of *Habeas Corpora Juratorum*, returnable (i). On the *third* Commission day, prisoners for debt, on arrest, are to be declared against, or they will be entitled to their discharge, on entering a Common Appearance. The *fourth* and *fifth* Commission days, have now no business peculiarly appropriated to them—the latter used to be a return day for all kinds of final process, issued during the Assizes; and also the teste of final process, then, or subsequently issued.

(i) But see the present Practice, B. 2, Ch. 13.

SECT. 2.—RULE DAYS.

Rule days.

There are, for the purpose of regulating the time of taking certain proceedings in this Court, four periods in the year, called *Rule Days*; one before, and one after, each Assizes. The Rule day *before* the Assizes (if not otherwise fixed), is on the fourth Thursday previous to the Assizes; unless the Assizes begin on a Thursday, and then on the third Thursday (ii). The Rule day *after* the Assizes, is on the fifth Thursday next following the end (j) of every Assizes, unless the Assizes end on a Thursday, and then on the fourth Thursday (or Thursday month), next afterwards (k).

Continuance of.

In practice, the Rule day is deemed to continue for three days, or during the remainder of the same week; and consequently when any proceeding is required to be taken on the Rule day, it may be taken on the Thursday, Friday, or Saturday in that week.

Business of, formerly.

The Rule-day was formerly the expiration of the time for pleading to Declarations filed in the previous Term, or assizes; and until lately, it was the time for Tenants to appear to actions of Ejectment. It used also to be the time appointed for filing Bail to writs returnable at the assizes; for appearing to, and filing Bail in, causes removed from inferior courts; and for lodging fines and recoveries with the Prothonotary. It is still the time limited for a Plaintiff to declare; and to answer pleadings filed by a Defendant; and, for a Defendant in replevin, to avow, reply to, or answer any pleading, filed by a Plaintiff.

At present.

SECT. 3.—RETURNS.

Returns.

Formerly, the only return in this Court, for all kinds of process, was at the assizes; and an action could not then have been brought to trial, at the earliest, before the next assizes but one after its commencement. To prevent such

(ii) Evans. Pr. C. & P. L. 12.

(j) That is, the last Commission-day.

(k) Reg. Gen. Lent Ass. 1751.

delay, it was provided by statute 22, Geo. II. c. 46, s. 35, *Mesne Process.* that the *mesne* process of this Court, should bear teste in the preceding assizes, and be made returnable on the first Wednesday of any month, or at the first day of the next assizes, at the election of the party. That Act, however, being confined to *mesne* process, great inconvenience was still felt for want of more frequent returns of other process: *Writs of Inquiry, Scifa, &c.* and it was therefore provided by 39 and 40, Geo. III. c. 105, s. 2, that writs of Inquiry of damages, *Scire facias*, and any judicial or other process, (except such as might be made returnable on the monthly returns) might be made returnable, either as they then were, (*viz.*, at the assizes) or on any of the Return-days, in Easter and Michaelmas-terms.

The last-mentioned Act has been altered by 1, W. IV., c. 7, the 8th section of which provides, that in lieu of the Return-days in Easter and Michaelmas-terms, all writs of Inquiry and other writs mentioned in the 39 and 40, Geo. III, might be made returnable on the first Wednesday in the month, in addition to the first and last days of the Assizes. A further alteration has been made by statute 4 and 5, W. IV., c. 62, which provides, that writs of Inquiry shall be made returnable on any day certain (*l*); and writs of Execution, may (if the party issuing the same shall think fit) be made returnable immediately after the execution thereof (*m*). This act also provides, that all writs, issued out of this Court, shall be tested in the name of the Chief Justice of the Court; or in case of vacancy of such office, in the name of one of the other Judges thereof: and, that all writs, except writs of Exigent and Proclamation, and process for Juries, shall bear date on the day on which the same shall be issued (*n*). *Executions.*

Writs for the removal of causes from inferior Courts to this Court, are required by stat. 1, W. IV., c. 7, s. 9, to be made returnable on the first Wednesday in the month next after the issuing thereof, unless, in the meantime, the assizes shall be holden for this county; and then, on the first or last day of such assizes, as the case may be, next after the issuing thereof. *Writs for removal of Causes*

(*l*) Sec. 18, 19.

(*m*) Sec. 33.

(*n*) *Id.*

Present Process
for commence-
ment of actions

In process for the commencement of personal actions, no return-day is mentioned. Such process, however, has four months to run, from the date, inclusive; and it would seem to be returnable on the last day of the four months, though, for practical purposes, the day on which it is executed, may be considered the return-day (o).

Summary.

Thus we have seen that now all Process of this Court, except Process for Juries, Writs of Exigent, and Proclamation (p), is *tested* on the day of issuing; and the *return* of process, except for the commencement of actions, is as follows, viz. of Writs of *Inquiry*, on any day certain, to be named therein: of Writs of *Scire facias*, and *other Judicial Process*, on the first Wednesday in any month; or on the first or last day of the Assizes: of Writs of *Execution*, either on the monthly returns, or at the Assizes, or immediately after execution, at the party's option: and of Writs for the removal of Causes, on the first Wednesday in the month, next after the issuing thereof, unless in the mean time the Assizes shall be holden, and in that case, on the first or last day of such Assizes, as the case may be, next after the issuing thereof.

(o) See 2nd Addenda to Chapman's Pr. K. B. 115. Atherton's Treat. 19.

(p) As to the teste and return of these Writs, see the respective Titles.

BOOK 1. CHAP. VI.

OF THE RECORDS AND OTHER OFFICIAL DOCUMENTS OF THE COURT (a).

The Official Documents of this Court are kept by the Deputy Prothonotary, and are contained in *Rolls, Books of Entries*, and on *Files* of different proceedings. The more ancient of them are preserved in a tower within the Castle of Lancaster, called the Record-room, and are methodically arranged in separate compartments, according to their nature and dates; and those for the last sixty or seventy years, are kept at the Prothonotary's office, at Preston; as are also the Indexes (called the Docket-rolls), of the ancient, as well as the modern Records. The Records, prior to the seventh year of the reign of George the Second, with the exception of some during the commonwealth, are written in the old Court hand, and in the Latin language; and the documents generally, are in good preservation.

The Rolls are either Plea-rolls, Fine-rolls, or Docket-rolls. The Plea-rolls contain the enrolment of Judges' Patents—Deeds (b)—Recognizances of Bail—Issues—and Judgments; and, before the abolition of fines and recoveries, this Roll contained the entry of King's silver on fines, and the enrolment of recoveries. It is the practice to order at the Prothonotary's office, before every assizes, the enrol-

Documents of the Court, by whom kept, and where.

What they consist of.

Plea-rolls.

(a) See the Report of the Committee appointed to inquire into the state of the public Records of this Kingdom, published in 1800, Page 257.

(b) Deeds of Bargain and Sale of Lands within the County, requiring enrolment under 27 H. 8, c. 16, may be enrolled in this Court, or in the Chancery of the County Palatine; and will have the same validity as if enrolled in any of the Courts at Westminster. - See Stat. 5, Eliz. c. 26. There are, however, but few such enrolments in this Court, and these are indexed on the Dockets of Fines and Recoveries.

ment of the pleadings in causes which stand for trial at such assizes (c): and thus, a new Plea-roll is made up before each assizes, and is styled as of the assizes preceding (d).

Fine Rolls.

The enrolment of Fines (e) and Recoveries in this Court, was regulated by Stat. 27, Eliz. c. 9, which provided (amongst other things) that in each of the counties Palatine, there should be for ever, an office, called the Office of the Enrolments of Fines and Recoveries, and that the Justices of the Counties Palatine, within the limits of their Commissions, should take charge of the enrolments, and enjoy the office and disposition thereof.

Before the abolition of Fines and Recoveries, by Stat. 3 and 4, W. 4, c. 74, it was the practice for the Prothonotary to make a new Fine Roll, before every Assizes. Each Enrolment contained the Writ of Covenant and return—the Entry of the King's Silver—the foot—and the Proclamations—and was signed by the Chief Justice of this Court. The Roll was then deposited in the Record Room at Lancaster, and not kept at Preston, like other modern Records; and by the Statute of Eliz. above referred to, it is provided that the Records of all Fines and Recoveries in this Court, and all the proceedings thereof, shall be deposited in such places, and kept by such persons, as the Justices of Assize for the County Palatine of Lancaster for the time being, shall direct.

(c) See post B. 2 Ch. 10.

(d) Since the removal of the assizes to Liverpool, the following style of the Plea Roll has been adopted:

“Pleas at Lancaster of the Session of Assizes holden at Lancaster, on Wednesday the twelfth day of August, and at Liverpool on Saturday the fifteenth day of August, in the sixth year of the Reign of our Sovereign Lord William the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the faith. Before Sir Nicolas Conyngham Tindal, Knight, Chief Justice of the said Lord the King, of his Court of Common Pleas at Westminster, and James Lord Abinger, Chief Baron of the said Lord the King, of his Court of Exchequer at Westminster, Justices of the said Lord the King at Lancaster.”

(e) The Stat. 37, H. 8, c. 19, makes Fines levied in this Court, of Lands within the County, as effectual as Fines levied in the Court of Common Pleas at Westminster. The Fines levied before that Act were comparatively few; although the Court possessed exclusive Jurisdiction over Fines and Recoveries of Lands within the County. See ante, p. 13.

The Docket Rolls are indexes to the early records of ^{Docket Rolls.} issues (f), and to all the Records of Fines and Recoveries. ^{Of Fines and Recoveries.} These Rolls are kept at Preston, for more ready reference; and the earliest of them is thus headed "*Med. negocior: int: Dum Ducem & partes ab anno Regalitatis sue primo p'plures annos sequentes, Inprimis d' Sessione Ascens: Dni Anno Regalit: &c. primo (g).*"

It may be proper to notice here, that there is this material and very inconvenient defect, in the early Dockets of Fines and Recoveries, viz. they give the names of the first-mentioned Deforceants, and Vouchees, only; so that if, for instance, A and B have joined in levying a fine of their respective estates, it is docketted under the title of "Fine of A and al.," and consequently it could not be ascertained whether B has levied the fine, without a laborious search through the records themselves. This defect has, however, been supplied in the dockets from the beginning of the reign of Geo. II. which contain the names of all the parties; and the still more modern dockets contain not only the names of all the parties, but also of the townships or places where the premises are situate.

Issues were formerly, as we have seen, docketted on the Dockets of ^{Issues.} Is-
same Roll as Fines and Recoveries; but since the beginning of the reign of George the Third, they have ceased to be so; and have lately been docketted in books kept exclusively for that purpose, and which serve as an index to all causes wherein the pleadings have been enrolled for trial, or in which the Judgments have been formally entered on Record.

There is no separate docket-roll, for the Judgments of ^{Of Judgments.} this Court, as in the Courts at Westminster; the statute (h) requiring Judgments to be docketted for certain purposes, being confined to the latter Courts: but the Record of a Judgment in this Court, is as effectual for all purposes, as if it was docketted.

(f) See infra.

(g) A memorandum of the business between the Lord the Duke, and Parties, from the first year of his Royalty for many years following, beginning at the Session of the Ascension of our Lord, in the first year of the Royalty, &c.

(h) 4 and 5, W. and M. c. 20.

Official Books. For the convenience of practitioners *Books* are kept at the Prothonotary's office, for the entry of different proceedings : thus, there are separate books for the entry of Writs, Bails, Appearances, and Rules. Books of Index (called *Pye-books*), to the Declarations, and Affidavits to hold to Bail. Books for the entry of Attorneys' Admissions and Certificates—for registering Articles of Clerkship—and for entering the names of persons applying for admission as attorneys.

The Imparance Book. The principal book, however, is called the *Imparance Book*, or *Book of Remembrance*, and contains at length, the names of all the parties to every Suit which has proceeded as far as Declaration, with minutes of most of the proceedings in the action, and when taken.

As an accompaniment to this book, there is an index or *Pye Book*, containing, in alphabetical order, the names of the defendants, and the number of the entry in the *Imparance Book* ; which number corresponds with that of the Declaration.

Other Documents.

The remaining documents are generally kept on *Files* ; thus there is a file for the memorandums left with the Prothonotary, on issuing Process, entering appearances, and filing bails ; there are separate files for returned writs—affidavits to hold to bail—affidavits of service of process—declarations—pleadings—consent rules in ejectment—bills of taxed costs, with affidavits of increase—jury process with panels annexed—Judges' orders—fines, for passing estates—and there is a file (called the minute file), containing a variety of papers, of a miscellaneous nature, such as warrants of attorney—cognovits—awards—minutes of motions—affidavits used in support of, or in opposition to, special bail—fiats for attorneys' admissions—and, in short, all other documents and memoranda, for which there is no separate File.

Inclosure Awards, &c.

Although *Inclosure Awards* are not connected with the proceedings of this Court, yet it may be proper to mention such of them as are kept by the Prothonotary, in the Record-room, at Lancaster ; these are the Awards for Burton

in Kendal—Caton—Chipping, Mitton, and Ribchester—
 Cloughton in Lonsdale—Halton—Hornby—Nether Kel-
 let—Over Kellet—Quernmore—Scotforth—Thornton-
 marsh—Ulverston—Whittington, and Newton-with-Doc-
 ker (i).

If a Record, or other document of this Court, be wanted as Evidence on the trial of a cause *in this Court*, a *Sub-pœna duces tecum*, or notice to produce it, must be served on the deputy Prothonotary, who will produce the same, for which he charges a fee of one guinea; and if a Judgment be required to be produced, which is not entered up in form, he will enter up the same without any additional fee (j). If, however, a Record be wanted as Evidence on a trial *in any other Court*, an examined office-copy thereof must be produced; as Records cannot be removed from place to place, to serve a private purpose (k): and where the Record itself is in Issue, in a Court of superior or concurrent jurisdiction, the trial is then by the tenor of the Record, which may be obtained by a writ of *Certiorari*, without the inconvenience of removing the original Record (l).

Documents of
 the Court, how
 proved.

An official extract from the books, shewing the state of proceedings, or a copy of the minute of a final Judgment, is sometimes taken: but such extract or copy, is

Extracts from
 and Copies and
 Certificates of
 proceedings.

(i) The following Inclosure and Tithe Awards are deposited with the Clerk of the Peace for the County viz.:—Astley—Cartmel—Caton—Chew Moor—Childwall, &c.—Chorley Moor—Cloughton—Crosby Marsh—Croston Finney—Egton-with-Newland—Ellel Common—Farnworth and Kersley—Farington Moss—Fulwood—Golborne—Harwood—Hawkshead Heights—Horwich Moor—Kirkby Ireleth—Lindale and Marton—Lancaster Tithe—Lathom and Skelmersdale—Little Woolton and Great Woolton—Newton—Pennington—Radcliffe and Ainsworth—Rawcliffe Moss—Rumworth—Siddall Moor—Silverdale—Skelding Moor—St. Michael's Tithe—Tonge-with-Haulgh—Tootill Hill and Reaps Moss—Twist Green—Walkden Moor—Warton-with-Lindeth—Westhoughton—Yealand.

(j) The Judgments of this Court have been considered to have relation to the first day of the Assizes next preceding the time of their entry; but the provision of the Stat. of Frauds as to the relation of Judgments was extended to this Court, by 8 Geo. 1, c. 25, s. 6: and by a late Rule of all the Courts [Rule 3, Hil. T. 4 W. 4.] all Judgments whether interlocutory or final, are required to be entered of record, for the day of the month and year, whether in Term or Vacation, when signed; and shall not have relation to any other day.

(k) Phil. Evid. 384, and see 27 Eliz. c. 9, s. 9, which prohibits the removal of the Records of the Fines and Recoveries of this Court.

(l) Phil. Evid. 386. Roscoe Evid. 53.

not, it seems, admissible as evidence (m). The Prothonotary will not, however, grant an extract from a Fine, Recovery, or Judgment, but an office copy may be had.

Searches.

All searches are made by, or in the presence of, the deputy Prothonotary, or his confidential clerks. The fee payable to the Prothonotary is 6s. 8d. for a search during each King's Reign, to which reference is made; and 1s. to the Court-keeper at Lancaster. If a search should be necessary among the Records themselves, which are kept at Lancaster, the Prothonotary charges a reasonable sum for his journey and attendance, according to circumstances: but the Records at Lancaster may be inspected during an Assizes, when the deputy Prothonotary is attending the Court there, without any extra charge.

The Attorneys of the Court, have access to such of the Books and Papers as are in daily use, without any charge whatever.

(m) Phil. Evid. 387. Roscoe Evid. 54.

BOOK 2.
OF THE PROCEEDINGS IN AN ACTION FROM ITS
COMMENCEMENT TO THE TRIAL.

CHAP. I.
OF THE COMMENCEMENT OF PERSONAL ACTIONS.

Before the Statute 4 and 5, W. 4, c. 62 (a), personal ~~Former Process.~~ actions in this Court, were commenced by Writ of *Capias ad respondendum, quare clausum fregit*, in all ordinary cases—by *original writ* in some instances, as in actions against Corporations—by *attachment* of privilege, at the suit of Attorneys, and other privileged persons—and by *Bill*, against Attorneys, and Officers, having privilege of the Court.

The above Statute has, however, abolished this diversity of ~~Present Process~~ Process, and substituted the Writ of *Summons*, as serviceable Process, for the commencement of personal actions—the writ of *Capias*, as bailable Process, for the like purpose—and the Writ of *Detainer*, as the proper Process when it is intended to detain any person in gaol.

These are declared by the Act, to be the only Writs for the commencement of *Personal* actions, in this Court, in the cases to which such Writs are applicable (b); and consequently the old mode of commencing such actions, by original Writ, Bill, and Attachment of Privilege; in the cases before mentioned, is at an end.

(a) By this Act, the Process of this Court, is assimilated to that which is provided by Stat. 2, W. 4., c. 39, (the uniformity of Process Act,) for the Courts at Westminster.

(b) Sec. 15.

To what Cases
the Stat. 4 & 5,
W. 4, c. 62, does
not extend.

The Act does not extend to *real* and *mixed* actions, and therefore such of these as are not abolished (c), may, as we have seen, be commenced as before; and it is expressly provided, that nothing therein contained, shall extend to any cause removed into this Court, by Writ of *Pone loquelam*, *Accedus ad curiam*, *Certiorari*, *Recordari facias loquelam*, *Habeas Corpus*, or otherwise (d). Neither does the Act prohibit the proceeding by *Scire facias*, on a recognizance of Bail (e), or to revive a Judgment; nor does it extend to a Writ of Error (f). It has also been determined, that the Statute applies to the *commencement* of actions only; and not to the continuance of those commenced, before it came into operation (g).

Former Rules
applicable to
present Process.

It may be proper to notice here, that all the Rules of this Court, in force at the time of passing the Act 4 and 5, W. 4, c. 62, respecting the proceedings in actions commenced by Writs of *Capias ad respondendum*, are declared by a late Rule (h) unless thereby altered, to be applicable to proceedings, in actions thenceforward to be commenced by Writs of *Summons*, *Capias*, and *Detainer*; in which last-mentioned actions the Prothonotary of this Court, or his deputy, is empowered to issue all such Rules, as he was, at the time of passing the said Act, empowered to issue, in actions commenced by Writs of *Capias ad respondendum*, or Rules to the like effect, *mutatis mutandis*.

SECT. 1.

OF SERVICEABLE PROCESS; OR, THE WRIT OF SUMMONS FOR THE COMMENCEMENT OF NON-BAILABLE ACTIONS.

Writ of Sum-
mons.

Previous to the Statute 4 and 5, W. 4, c. 62, the Writ of *Capias ad respondendum* was used in this Court, as well

(c) See ante pa. 14 (note e).

(d) Sec. 14.

(e) Atherton's Tr. pa. 4. Tidd's Pr. (1833) pa. 63.

(f) Tidd's Pr. (1833) pa. 63.

(g) Storr v. Bowles, 4 Barn. and Ad. 112. 1 Dow. P. C. 516, S. C. Finnie v. Montague, 5 Barn and Ad. 877.

(h) Reg. Gen. (1) Mar. Ass. 5 W 4.

for bailable as serviceable Process : but the first Section of this Act provides, that "the Process in all *personal* actions, hereafter to be commenced in this Court, where "it is not intended to hold the defendant to Special Bail, "shall, whether the action be brought by or against any "person entitled to the privilege of Peerage, or of Parlia- "ment, or of the said Court, or of any other Court, or to "any other privilege, or by or against any other person, "be according to the form contained in the Schedule, to "this Act annexed, marked No. 1 (i), and shall be called a "Writ of *Summons*."

(i) *Form of Writ of Summons, Memorandum, and Indorsements.**

"William the Fourth [by the grace of God of the United Kingdom of "Great Britain and Ireland, King Defender of the Faith] to C. D. of, &c. "in the county of Lancaster [*the place and residence, or supposed resi- "dence of the defendant, or wherein the defendant shall be, or shall be "supposed to be*], greeting, We command you (or, as before, or, often "we have commanded you,) that within eight days after the service of this "Writ on you, inclusive of the day of such service, you do cause an ap- "pearance to be entered for you in our Court of Common Pleas at Lan- "caster, in an action on promises (*or as the case may be*) at [the suit of "A. B. and take notice that in default of your so doing, the said A. B.† "may cause an appearance to be entered for you, and proceed therein to "judgment and execution. Witness [*the name of the Chief Justice of "this Court, or in case of a vacancy of such office, the name of one of "the other judges thereof*] at Lancaster, the day of [the day "of issuing †] in the year of our reign."

Memorandum to be subscribed on the Writ.

"N.B. This Writ is to be served within four calendar months from the "date thereof, including the day of such date, and not afterwards."

Indorsement[s] to be made on the Writ before Service thereof.

"This Writ was issued by E. F. of Attorney for the Plaintiff
"or Plaintiffs within named." or "This Writ was issued by of
"agent for G. H. of Attorney for the Plaintiff or Plaintiffs within
"named," or "this Writ was issued in person by the Plaintiff or Plaintiffs
"within named, who resides or reside at (*mention the city, town, or parish,*
"and also the name of the hamlet, street, and number of the house of the

* Note. The parts within brackets [£] are not contained in the original Schedule to the Act.

† The word "you" is to be construed distributively where there are several defendants. *Engleheart v. Eyre* and an. 2 Dow. P. C. 145.

‡ If the name of the Plaintiff be omitted here, it is an irregularity. *Smith v. Crump*, 1 Dow. P. C. 519.

§ If dated on a Sunday, the Writ is a nullity; and the objection is not waived by lapse of time. *Hanson v. Shackleton*, 4 Dow. P. C. 48.

a defendant by initials, or by a wrong name, see the next Section (n).

It is directed by the 4 and 5, W. 4, c. 62, s. 1, that "in every such Writ, and copy thereof, the place and residence, or supposed residence of the party defendant, or wherein the defendant shall be, or shall be supposed to be, shall be mentioned;" and it has been held that this must be stated in the *body* of the Writ, as prescribed by the Schedule, and that it is not sufficient to *indorse* it on the Writ (o), or to mention it in the copy, only (p). It is observable that in the form of the *Summons*, the place and county are stated, whereas in the *Capias* a blank is left, from which circumstance and from the language of the Act, it is questionable whether the same degree of exactness in the statement of residence, is required in a *Capias* as in a *Summons* (q). The usual mode of stating a defendant's residence, in the Process of this Court, is, by mentioning the town, and county, thus, "C. D. of Liverpool, in the county of Lancaster;" and if the actual residence be not known, the *supposed* residence must be stated (r).

The action must be described in such a way, as to convey information to the Defendant, of its real nature; as for instance, an action "of debt," or, "on promises:" "Trespass on the Case" is not a sufficient description of an action "on promises" (s), but, "slander" is a sufficient description of an action for words spoken (t), and "libel" for words written (u).

(n) But the Rule (19) of Mar. Ass. 2 W. 4, there referred to, seems to be confined to bailable process.

(o) *Lindredge v. Roe*, 1 Bing. N. C. 6. *Roberts v. Wedderburne* Id. 4.

(p) *Rice v. Huxley*, 2 Dow. P. C. 231; 4 Tyr. 68, S. C. 2 C. & M. 211, S. C. *Nom. Price v. Huxley*.

(q) *Buffle v. Jackson*, 2 Dow. P. C. 505. *Welch v. Langford*, Id. 496. *Perring and others v. Turner*, 3 Id. 15. *Border v. Levi*, Id. 150. *Hill v. Harvey*, 4 Id. 163.

(r) As to the mode of stating a defendants' description, in Process of the Courts at Westminster: See *Jelks v. Fry*, 3 Dowl. P. C. 37. *Morris v. Smith*, Id. 698.

(s) *Richards v. Stuart*, 3 M. and Scott, 774. 2 Dowl. P. C. 752, S. C. 10 Bing. 319, S. C. *Gurney v. Hopkinson*, 3 Dowl. P. C. 189.

(t) *Davies v. Parker*, 2 Dowl. P. C. 537.

(u) *Pell v. Jackson*, Id. 445.

Indorsements
on the Writ be-
fore service.

The date and teste of the writ will be seen from the form *ante* pa. 53; and, with respect to the *Indorsements*, those to be made *before* Service, are the name of the Attorney, Agent, or Party issuing the writ, and the amount of debt and costs; and that *after* Service, is a memorandum of the day of the week, and month of Service (*a.*)

Name and Resi-
dence of Attor-
ney, &c.

It is provided by the 10th section of 4 and 5, W. IV. c. 62, that "upon every writ to be issued as aforesaid, "by authority of that Act, the name or firm, and the "place of business or residence of the Attorney or Attor- "neys issuing such writ, shall be indorsed thereon: and "where such Attorney or Attorneys shall be agents only, "then there shall be further indorsed thereon, the name "or firm, and place of business or residence of the prin- "cipal Attorney or Attorneys: but in case no Attorney or "Attorneys shall be employed for that purpose, then a "memorandum shall be indorsed thereon, expressing that "the same has been sued out, by the Plaintiff in person, "mentioning the City, Town, or Parish, and also, the name "of the Hamlet, Street, and number of the House, of such "Plaintiff's residence, if any such there be." Under this section it seems that a firm is properly described thus, "*Poole & Gamlen (v),*" or, "*Milne, Parry, Milne, and Morris,*" "*Agents for Shaw, Billericay,*" without mentioning the Christian-names (*w*). As to residence, it is usual to state the *town* where the Attorney resides, thus, "*E. F. of [Preston], in the County of Lancaster,*" adding if he be Agent, the words "*Agent for G. H. of [Liverpool], in the County aforesaid,*" &c. (*x*).

An Attorney suing in *person*, is properly described as of his place of *business*, and may be described as "of" a particular place, without stating that he resides there (*y*); and

(*a*) See *ante* pa. 53 & 54 (note) and *post* pa. 62.

(*v*) *Engleheart v. Eyre* and an. 2 Dowl. P. C. 145.

(*w*) *Pickman v. Collis*, 3 *ld.* 429.

(*x*) In the Process of the Courts at Westminster, it has been held that "*Gray's Inn, London,*" is sufficient. *Jelks v. Fry*, 3 Dowl. P. C. 37, but that "*Southampton Buildings*" without more, is not. *Rust v. Chine*, 1d. 565.

(*y*) *Yardley v. Jones*, 4 *ld.* 45.

"No. 1, Clifford's Inn Passage, Fleet-street, in the City of London," is enough, without naming the parish (z).

As to calling upon the Plaintiff's Attorney to declare, whether the writ has been issued with his authority, &c., see the next section.

In addition to the indorsements required by the Act, ^{Amount of Debt and Costs.} there must also be indorsed "upon every bailable process and warrant, and upon the Copy of every process served for the payment of any debt, the amount of the debt and the amount of what the Plaintiff's Attorney claims for the costs of such process, arrest, or copy and service, mileage, and attendance to receive debt and costs; and that upon payment thereof, within four days after the arrest or service, to the Plaintiff or his Attorney, further proceedings will be stayed (a)." This Rule was made before the statute 4 and 5, W. IV., c. 62; but by a Rule made subsequently (b) it was declared, "that the above Rule shall be applicable to Writs of *Summons*, *Capias*, and *Detainer*, issued under the authority of the said Act, and to the copy of each such writ."

This Rule applies to Process against Attorneys, as well as others (c): but does not apply to an action on a Bail Bond, or Replevin Bond (d); nor indeed to any case, unless the action is for a debt, and nothing besides (e), and the indorsement should not be made, where the action is for unliquidated damages (f).

In cases requiring this indorsement, the rule is imperative (g); and the indorsement must strictly follow the form

(z) *Arden and an. v. Jones*, 4 Dowl. P. C. 120, and see *King v. Monkhouse*, 2 Cr. and M. 314.

(a) Reg. Gen. (43) Mar. Ass. 2 W. 4.

(b) Reg. Gen. (2) Mar. Ass. 5 W. 4.

(c) *Tomkins v. Chilcote*, 2 Dowl. P. C. 187.

(d) *Rowland v. Dakeyne and others*, 1d. 832. *Smart v. Lovick and others*, 3 1d. 34.

(e) *Curwin v. Moseley*, 1 Dowl. P. C. 432. *Perry v. Patchett*, 2 1d. 667. 1 Cr. M. and R. 87, S. C.

(f) *Bowditch v. Slaney*, 4 Dowl. P. C. 140.

(g) *Ryley v. Boissomas*, 1 Dowl. P. C. 383. *Tomkins v. Chilcote*, *Supra*.

prescribed (*h*), though it seems, that mere surplusage, or the omission of immaterial particles, will not constitute an irregularity (*i*). An amendment will be allowed, upon payment of costs, and giving the defendant four days further time for paying debt and costs (*j*); but a Judge at Chambers cannot amend this indorsement, by reducing the amount of the claim, in order to try the Cause before the Sheriff (*k*).

The amount of *debt* should be stated with certainty; but it is sufficiently definite to state, a sum for debt, with interest thereon from a day certain (*l*). The amount of *costs* is fixed by Rule of Court: and mentioned in another place (*m*).

Effect of indorsing too much for Debt.

Or for Costs.

If the defendant do not pay the debt and costs within the four days, he is not afterwards entitled to a stay of proceedings, on payment of the sum indorsed (*n*): but if a larger *debt* than is due be indorsed, whereby the defendant is misled, the proceedings will be stayed, on payment of the real debt, with the Costs of the Writ only, on an application being promptly made for that purpose (*o*): and if too much be indorsed for *Costs*, it is provided (*p*) that “notwithstanding a defendant may have paid the amount “of Costs, claimed by the Plaintiff’s Attorney, he may, at “any time within a month afterwards, obtain a Rule from “the Prothonotary of this Court, or his deputy, calling upon “the Plaintiff’s Attorney, to deliver to the defendant, a “signed Bill of his Costs, which the defendant may afterwards “have taxed, on depositing with the said Prothonotary, “or his deputy, the sum of seven shillings: and if *one sixth* “be deducted from the amount charged for [Chancellor’s

(*h*) *Shirley v. Jacobs*, 3 Dowl. P. C. 101. *Hooper v. Waller*, 1 Cr. M. & R. 437, and see the form Reg. Gen. (43), Mar. Ass. 2 W. 4.

(*i*) *Sutton v. Burgess*, 1 Cr. M. & R. 770. *Forbes v. Mason*, 3 Dowl. P. C. 104.

(*j*) *Urquhart v. Dick*, 3 Dowl. P. C. 17. *Colls v. Morpeth*, 1d. 23. *Shirley v. Jacobs*, *supra*.

(*k*) *Trotter v. Bass*, 3 Dowl. P. C. 407.

(*l*) *Sealy v. Hearne*, 3 Dowl. P. C. 196. *Coppelo v. Brown*, 1d. 166. 1 Cr. M. & R. 575, S. C.

(*m*) See *post* B. 5, Ch. 22.

(*n*) *Bowditch v. Slaney*, 4 Dowl. P. C. 140.

(*o*) *Elliston v. Robinson*, 2 Dowl. P. C. 241. 2 Cr. and M. 343, S. C.

(*p*) Reg. Gen. (47 & 48), Mar. Ass. 2 W. 4, and see *ante* pa. 54.

"fine (g)], *mileage*, or *agency*, the Plaintiff's Attorney shall pay the costs of the application; but, if less than one-sixth shall be disallowed, the costs of the application shall be in the discretion of the said Prothonotary, or his deputy." And "if any overcharge be made by the Plaintiff's Attorney, in the amount charged for *writ*, *arrest*, or *service* and *copy*, and *attendance to receive debt and costs*, the Plaintiff's Attorney shall pay the costs of the application." Where there is a mistake in the indorsements, the Court will allow an amendment, upon payment of costs (r); and, by a late Rule (s), it is declared, that "if the Plaintiff, or his Attorney, shall omit to insert in, or indorse on, any writ, or copy thereof, any of the matters required by the Act (t), to be by him inserted therein, or indorsed thereon, such writ, or copy thereof, shall not, on that account, be held void; but may be set aside as irregular, upon application to be made to this Court, or one of the Judges thereof." The omission to indorse on the writ what is required by *Rule of Court* will also render the writ voidable, for irregularity (u); but "no application to set aside process or proceedings for irregularity, shall be allowed, unless made within a reasonable time; nor, if the party applying has taken a fresh step, after knowledge of the irregularity (v)," however short the time for doing so may be (w)—Six days after service of the writ, is not an unreasonable time (x); but where the writ was served on the 25th October, an application on the 3rd November (the 2nd being Sunday) is too late (y).

Consequence of omission to indorse the Writ.

Having seen what is required to be inserted in, and indorsed on, the writ, it remains to be shewn, when, and in what manner, the writ is to be issued, and how executed.

- (g) The Chancellor's fine is abolished.
- (r) *Hannah v. Wyman*, 3 Dowl. P. C. 673, and see *ante* pa. 58.
- (s) Reg. Gen. (3), Mar. Ass. 5 W. 4.
- (t) 4 & 5 W. 4, c. 62.
- (u) *Jones v. Price*, 2 Dowl. P. C. 410.
- (v) Reg. Gen. (20), Mar. Ass. 2 W. 4. See *Cox v. Tullock*, 1 Cr. and M. 531.
- (w) *Fynn v. Kemp*, 2 Dowl. P. C. 620.
- (x) *Smith v. Pennell*, 1d. 654,
- (y) *Tyler v. Green*, 3 Dowl. P. C. 439.

When to issue the Writ, generally.

To be in time for the Assizes.

The writ may be issued on any *dies juridicus* after the cause of action has accrued; and as the question is often asked, when is the last day on which an action may be commenced in this Court, to be in time for trial at the Assizes, it may be proper to observe, that if the writ be served *twenty-five days exclusive*, before the Assizes, it will be in time (z); provided the Plaintiff can take the further steps in the Cause, on the very days allowed by the practice of the Court, for that purpose: but it is not safe to rely on his ability to do this—several causes may prevent him: for example, if a special plea be filed, on which he cannot join issue *instantly*, he will consequently lose the Assizes.

Mode of issuing the Writ.

It is expressly provided by Stat. 4 and 5, W. 4, c. 62, that the Writ of Summons shall be issued by the Prothonotary of this Court, or his deputy (a); that it shall bear date, on the day whereon it is issued (b); and be tested in the name of the Chief Justice, of this Court; or in case of a vacancy of such office, in the name of one of the other Judges thereof (c). The practice on issuing the Writ, is now, as it was before the Act, to get it signed (d) by the Prothonotary, on leaving with him, a written memorandum; and afterwards to get it sealed, on a docket obtained from the acting Cursitor.

Amendment of the Writ, when to be made.

If it become necessary to alter the Writ, after it has been issued, it must be re-sealed before service; (e) after service, it seems an amendment of the *Writ* will not be allowed, unless it be issued for the purpose of saving the Statute of Limitations (f); though, as we have seen, amendments of the *Indorsements* are allowed (g).

(z) *Ex. gra.* To have been in time for the last Assizes, which commenced at Lancaster on the 12th, and at Liverpool on the 15th August, the Writ must have been served with a view to a trial at the former place, on the 17th, and at the latter, on the 20th, July.

(a) Sect. 1.

(b) Sect. 33. It is not sufficient to *indorse* on the Writ, the day of issuing: *per* Bayley B. Anon. 1 Dowl. P. C. 654.

(c) Sect. 33.

(d) The Statute seems to have taken away the necessity of the officer's dating the Writ. See Tidd's Pr. (1833), pa. 68 (note b).

(e) *Siggers v. Sansom*, 2 Dowl. P. C. 745. *Braithwaite v. Lord Montford*, 2 Cr. & M. 408.

(f) *Lakin and others v. Watson*, 2 Dowl. P. C. 633. *Hannah v. Wyman*, 3 Id. 673.

(g) *Ante* pa. 58 & 59.

The Writ may be served by any person, competent to make an affidavit of the fact; and the service is required (h) to be, "in the manner heretofore used in the County Palatine of Lancaster, and not elsewhere (i)," that is, by serving the defendant (or each of the defendants, if more than one) *personally* within the county, with a true Copy (j) of the Writ, having thereon all the requisite memoranda, and indorsements. The original need not be shewn, unless sight thereof be demanded, at the time of service; or immediately afterwards (k). *Personal* service may be, when you see the defendant, and bring the process to his notice; it not being absolutely necessary to leave it, in his actual corporal possession (l); and if he refuse to receive the Copy, it may be thrown down in his presence, he being informed of it; (l) or placed on his shoulder (m). Although the Courts have, of late, been strict in requiring service on the defendant himself, yet there are cases in which this rule has been relaxed; as, where the defendant eluded service, and the Writ was left with his son, who said his father was in the house, and should receive the process (n).

When the action is against a "*Corporation aggregate*," it is provided (o), that "the Writ of Summons may be served on the Mayor, or other head officer; or on the

(h) 4 and 5, W. 4, c. 62, s. 1.

(i) Although the words "and not elsewhere," are in the Act, it is difficult to assign any meaning to them. Their introduction seems to be a mistake, and may be thus accounted for—The Clause in the Bill, on which the Act is founded, was originally as follows:—"Shall be served, in the manner heretofore used in the County Palatine of Lancaster, or within two hundred yards of the border thereof, and not elsewhere," and probably the whole of the Clause, after the word "Lancaster," was intended to be struck out, by the Committee of the House of Commons.

(j) *Smith v. Pennell*, 2 Dowl. P. C. 654 where the word "London" being omitted in the indorsement was held to be irregular; and see *Byfield v. Street*, 1d. 739. where an amendment of the Copy of a Writ of *Capias* was refused.

(k) *Petit v. Ambrose*, 6 Maule & S. 274; *Westley v. Jones*, 5 J. B. Moore, 162; *Thomas v. Pearce*, 2 B. & C. 761: 4 D. & R. 317, S. C.

(l) *Thompson v. Phenev*, 1 Dowl. P. C. 441.

(m) *Bell v. Vincent*, 7 D. & R. 233.

(n) *Rhodes v. Innes*, 7 Bing 329; 5 M. and P. 153, S. C. and see *Phillips v. Ensell*, 1 Cr. M. & R. 374, 2 Dowl. P. C. 684, S. C.; *Cohen v. Watson*, 3 Tyr. 238; and as to sending process by the post, see *Aldred v. Hicks*, 5 Taunt. 186.

(o) 4 and 5, W. 4, c. 62, s. 11.

"Town-clerk, Clerk, Treasurer, or Secretary, of such Corporation : and every such writ issued against *the Inhabitants of a Hundred, or other like district*, may be served "on the High Constable thereof, or any one of the High Constables thereof, and every such writ issued against *the Inhabitants of the County of Lancaster, or the Inhabitants of any Franchise, Liberty, Town, or Place, not being part of a hundred, or other like district*, on some "peace-officer thereof."

When service to
be effected.

Before the statute 4 and 5, W. IV., c. 62, the service must have been, *on* or before the day of return named in the writ (*p*) ; now, as we have seen, no return-day is mentioned therein : but the process will not be in force for more than four calendar months from the day of the date thereof, including the day of such date ; (*q*) and it would seem, that it may be executed, at any time on the last day of the four months.

Where.

The Writ cannot be served out of the county, there being no provision in the Act, (as in the Statute 2 W. 4, c. 39,) allowing service within two hundred yards of the border of the county. The affidavit in support of an application to set aside the service as being out of the county, must distinctly state, not only that the service was not on the confines of the county, but that there is no dispute as to the boundary (*r*), or it must shew what is equivalent ; for instance, that the place of the service is five miles from the nearest part of the county (*s*).

Indorsement on
the Writ after
service.

The person serving the writ, must indorse thereon, the day of the month and week of service(*t*) ; and this must be done within *three* days after service, otherwise the Plaintiff cannot enter an appearance for the Defendant, according to the statute : and every Affidavit upon which such an appearance shall be entered, must mention the day on

(*p*) Evans' Pr. C. P. L. 18.

(*q*) 4 & 5, W. 4. c. 62. s. 8.

(*r*) Chace v. Joyce, 4 Maule and S. 412 ; Storer v. Rayson, 4 D. & R. 739 ; 3 B. & C. 158, S. C. Coulson v. King, 2 ; Cr. & J. 474 ; Webber v. Manning, 1 Dowl. P. C. 24 ; Thomson v. Burton, 1d. 428.

(*s*) Lloyd v. Smith, 1 Dowl. P. C. 372.

(*t*) 4 & 5, W. 4. c. 62. s. 1.

which such indorsement was made (u). But where the defendant, on being served, snatched the Writ out of the hand of him who served it, an appearance was allowed to be entered, without this indorsement (v).

If the defendant shall not have been served with the Summons, during the four months that it has to run, such Writ may be continued by *alias*, and afterwards, if necessary, by *pluries* (w); or the plaintiff may apply for leave to issue a Writ of *Distringas* (x). The forms of the Writs of *alias* summons, and *pluries* summons, are given in the Schedule to the Statute 4 & 5 W. 4. c. 62 (y). These Writs are tested, indorsed, issued, and served, and have the same time to run, as the first Writ, and must correspond with it. An *alias* may be issued more than four months after the expiration of the first Writ; and the entry of continuances, necessary to connect it with such Writ, may be entered at any time, provided the Writs be not issued for the purpose of avoiding the Statute of Limitations (z).

Although the Writ of Summons is peculiarly appropriated to the commencement of a non-bailable action, yet the Writ of *Capias*, when it is against several defendants, may be used against some of them, as serviceable process (a); and when a *Capias* is thus used, the practice hitherto has been, for the Sheriff, with whom the Writ is lodged, to send it to an officer, generally the one who arrests the co-defendant: the officer indorses a memorandum of service on the Writ, which he returns to the Sheriff; and an affidavit of service (b) is procured from the officer.

(u) Reg. Gen. (6) Mar. Ass. 5 W. 4. and see the form of such affidavit post pa. 80.

(v) *Brook v. Edridge*. 2 Dowl. P. C. 647.

(w) 4 & 5, W. 4, c. 62. s. 8.

(x) *Id.* Sec. 3. See post pa. 81.

(y) See ante pa. 53.

(z) *Nicholson v. Leman*, & an. 2 Dowl. P. C. 296. 2 Cr. & M. 469. S. C.

(a) See post pa. 68.

(b) This Affidavit is similar to that of the service of a Summons, (see post pa. 80), altering the name of the writ, and stating that the defendant was served with a copy of the writ, and of the memorandum subscribed thereto, and the *warning* and indorsements thereon.

Requisites to be observed for saving the statute of Limitations.

If the plaintiff wishes to save the Statute of Limitations, he must attend to the 8th Section of the Stat. 4 and 5, W. 4, c. 62, which enacts, that "no first Writ shall be available, to prevent the operation of any Statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such Writ, and every Writ (if any) issued in continuation of a preceding Writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ, and return to be made, in bailable process by the Sheriff or other officer to whom the writ shall be directed, or his successor in office, and, in process not bailable, by the Plaintiff, or his Attorney suing out the same, as the case may be (c)." Under this section, a writ issued with a view to prevent the operation of the statute of limitations, may be returned *non est inventus*, without any attempt at service (d).

SECT. 2.

OF THE WRIT OF CAPIAS FOR THE COMMENCEMENT OF BAILABLE ACTIONS.

Bailable process for what amount.

In order to hold a Defendant to bail in this Court, there must be a cause of action amounting to *twenty pounds*

(c) This clause is similar to the one in 2 W. 4, C. 39; and as to the proceedings thereon, see Arch. Pr. (by Chitty), 792. Athert. Tr. 120: and for forms see App. to Tidd's Pr. (1833), pa. 253. & Chitty's forms, 620.

(d) Williams v. Roberts, 1 Cr. M. & R. 676. 3 Dowl. P. C. 512. S. C.

at least, exclusive of any costs that may have been incurred in suing for the same (a).

As to the causes of action for which a Defendant may be arrested; as to a second arrest for the same cause; and, as to privilege from arrest, the like rules prevail in this Court, as in the Courts at Westminster: but it is expressly provided, that "no person shall be held to special bail in any action of Trespass, Trover, or Detinue, in this Court without an order made for that purpose, by one of the Judges thereof (b);" and that "after Nonpros, Nonsuit, or Discontinuance, the Defendant shall not be arrested a second time without the order of one of the Judges of this Court (c).

In what cases defendants may be held to bail.

Before the issuing of a bailable writ an affidavit of debt must be made, or a Judge's order obtained, to hold the Defendant to bail. Such affidavit should be entitled in this Court, but not in any cause. It may be sworn before the Plaintiff's Attorney (d); though, if sworn in this country it must be so, before a person authorized to take affidavits in this Court (e): if sworn elsewhere, and not before a Commissioner of this Court, it must be verified, as is required by the practice of the Courts at Westminster, and a Judge's order obtained thereon to hold the Defendant to bail. The addition of the person making the affidavit must be inserted therein (f); and the name of the parties should be given in full: but "where the Defendant is described in the process, or affidavit to hold to bail, by initials, or by a wrong name, or without a Christian-name, the Defendant shall not be discharged out of custody, or the Bail-bond delivered up to be can-

Affidavit to hold to bail.
Before whom sworn.
Requisites to be stated in the affidavit.

(a) See stat. 7 & 8, Geo. 4. c. 71. s. 1.; the seventh section of which act prohibits arrests in *Counties Palatine*, upon process issuing from the Courts at *Westminster*, unless such process be indorsed for bail, in a sum not less than fifty pounds.

(b) Reg. Gen. Aug. Ass. 57 Geo. 3.

(c) Reg. Gen. (5) Mar. Ass. 2 W. 4.

(d) Reg. Gen. (4) Mar. Ass. 2 W. 4.

(e) That is before a Judge or Commissioner of the Court, or the officer who shall issue the process; see post B. 5 Ch. 23.

(f) Reg. Gen. (3) Mar. Ass. 2 W. 4; and as to designating parties by initial letters, or some contraction of the Christian name, in actions on written instruments; see 3 & 4, W. 4. c. 42, s. 12: see also the 11 sect. of the same statute which abolishes the plea of misnomer.

"celled, if on a summons, or a rule to shew cause, for that purpose, it shall appear to the Court, or to the Judge before whom cause is shewn, that due diligence has been used to obtain knowledge of the proper name (g)."

In general, the same requisites are to be attended to, in affidavits to hold to bail in this Court, as in similar affidavits in the Courts at Westminster: and "affidavits to hold to bail for money paid, to the use of the Defendant, or, for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the Defendant (h)."

Capias.

Before the statute 4 and 5, W. IV., c. 62, the writ of *Capias ad respondendum* was, as we have seen, the ordinary process of this Court for the commencement of personal actions, as well non-bailable as bailable; but, by that Act, the *Capias* is peculiarly appropriated to bailable proceedings; and it is thereby provided (i), that "in all actions, wherein it shall be intended to arrest and hold any person to special bail, who may not be in custody of the keeper of the gaol of the said county, the process shall be by writ of *Capias*, according to the form contained in the Schedule to the act, marked No. 4 (j); and so many copies of such process, together with every memo-

(g) Reg. Gen. (19) Mar. Ass. 2 W. 4, and as to what is considered due diligence see *Hicks v. Marreco*, 1 Cr. & M. 84.

(h) Reg. Gen. (6), Mar. Ass. 2 W. 4.

(i) Sect. 4.

Form of the writ of Capias.

(j) *Form of the writ of Capias, with the memorandum, warning, and indorsements, as prescribed by the Act:*

William the Fourth, &c.: to the Sheriff of Lancashire, [or to the Coroners of the County of Lancaster, or as the case may be], greeting. We command you [or as before, or often we have commanded you], that you omit not by reason of any liberty in your Bailiwick, but that you enter the same and take *C. D.*, of* if he shall be found in your Bailiwick, and him safely keep until he shall have given you bail, or made deposit with you, according to law, in an action on promises † [or of debt, &c.], at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from your custody: And we do further command

* As to describing the defendant, see ante pa. 55.

† As to stating the nature of the action, see *Id.*

"randum, or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be

you, that on execution hereof you do deliver a copy hereof to the said *C. D.*: And we do hereby require the said *C. D.* to take notice, that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of Common Pleas at Lancaster to the said action, and that in default of his so doing such proceedings may be had and taken, as are mentioned in the warning hereunder written, or indorsed hereon: And we do further command you, the said Sheriff, [or Coroners, or, as the case may be], that immediately after the execution hereof you do return this writ to our said Court, together with the manner in which you shall have executed the same, and the day of the execution hereof; or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner, if you shall be thereto required by order of the said Court, or by any Judge thereof.—Witness [Chief Justice &c., as in a *Summons*], at Lancaster, the [day of issuing], day of in the year of our reign.

Memoranda to be subscribed to the writ.

N.B.—This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A Warning to the Defendant.

I.—If a defendant, being in custody, shall be detained on this writ, or if a defendant being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant on or before the third commission day of the Assizes (exclusive of a Sunday) next after such detainer or arrest, and proceed thereon to judgment and execution.

II.—If a defendant, being arrested on this writ, shall have made a deposit of money, according to the statute, seventh and eighth of George the fourth, chapter seventy-one, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

III.—If a defendant, having given bail on the arrest, shall omit to put in special bail, as required, the plaintiff may proceed against the Sheriff, or on the Bail bond.

IV.—If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Indorsements to be made on the Writ of Capias.

Bail for pounds, by affidavit—or, Bail for pounds, by order of [naming the Judge making the order] dated the day of .

This writ was issued by *G. H.*, of * attorney for the plaintiff [or plaintiffs] within named—or, This writ was issued by of , agent for *E. F.*, of , attorney for the plaintiff [or plaintiffs] within named—or, This writ was issued in person by the plaintiff or plaintiffs within named, who resides or reside at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.]

[Here indorse, as follows, the amount of debt and costs pursuant to Reg.

* As to describing the attorney, agent, or party issuing the writ, see ante pa. 56.

"arrested thereon, or served therewith, shall be delivered therewith to the Sheriff or other officer, or person, to whom the same may be directed, or who may have the execution and return thereof; and who shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest; and shall indorse on such writ, the true day of the execution thereof, whether by service or arrest: and if any Defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties for his appearance thereto, the Plaintiff in such process may, after the detainer or arrest of such Defendant, declare against such Defendant, and proceed thereon according to the practice of the said Court, as against a Defendant in custody on Mesne process: provided always, that it shall be lawful for the Plaintiff, or his Attorney, to order the Sheriff or other officer, or person, to whom such writ shall be directed, to arrest one or more only, of the Defendants therein named, and to serve a copy thereof, on one or more of the others, which order shall be duly obeyed by such Sheriff or other officer, or person: and such service shall be of the same force and effect, as the service of the writ of Summons, and no other."

Although the statute directs, that the writs of Summons, Capias, and Detainer, shall be the only writs for the commencement of personal actions in this Court, in the cases

Gen. (43) Mar. Ass., 2 W. 4; and Reg. Gen. (2) Mar. Ass., 5 W. 4, see ante pa. 57].

The plaintiff claims £ † for debt, and [£3 13s. 6d.] for writ, arrest, and attendance to receive debt and costs, together with ‡ for mileage or agency (if any) being in the whole £ § for costs; and if the above amounts of debt and costs be paid to the plaintiff or his attorney, within four days from the arrest or service hereof, || further proceedings will be stayed.

† As to stating the amount of debt, see ante pa. 57.

‡ See as to extra costs, post. B. 5, c. 22.

§ As to these words, see Reg. Gen. (43) Mar. Ass. 2 W. 4; and see Sutton, v. Burgess, 3 Dowl. P. C. 489.

to which such writs are applicable (*k*) ; yet, it expressly exempts from arrest, outlawry, or waiver, any person who by reason of any privilege, usage, or otherwise, may, by law, be exempt therefrom (*l*).

The form of the *Capias*, as given by the Act, must be strictly adopted (*m*) : this writ, like the Summons, must contain the names of all the Defendants (if more than one), in the action ; but not the name or names of any Defendant or Defendants, in more actions than one (*n*) ; and a Plaintiff cannot, after bailable process against two Defendants, declare against one of them only, as he may after a writ of Summons (*o*). As to the other matters to be stated in the writ, and indorsed thereon, and the consequence of a mistake or omission in these particulars, see *ante* pa. 54 and *seq.*

Contents of the Writ.

Defendants names.

Other matters.

The *Capias* is dated, tested, and has the same time to run, as a writ of Summons. It is signed by the Prothonotary, on leaving with him, the affidavit of debt, or Judge's order, and a memorandum similar to that required on issuing a Summons. After the writ is sealed, it is lodged with the Sheriff, who grants his warrant thereon, and generally delivers it to the party ; and where one Defendant is to be served, and another arrested, the Sheriff sends the writ to the officer, to enable him to swear to the service of a copy, and to indorse a memorandum of service. The Attorney, or his agent, usually instructs the officer.

Issuing.

By a rule of Court (*p*) made before the passing of the Act, a copy of the *warrant* and of the notice to pay the debt and costs, was required to be given to the Defendant, at the time of the arrest ; and the Act requires that a copy of the *process*, with the memorandums and indorsements,

Copy of the process to be delivered to the defendant.

(*l*) Sec. 15. The act is silent as to the course to be taken in a joint bailable action, where one defendant is in gaol, and the other at large : but see post B. 4, ch. 4.

(*i*) Sec. 14.

(*m*) Jackson, v. Jackson, 3 Dowl. P. C. 182. And see *ante* pa. 54.

(*n*) Reg. Gen. (5) Mar. ass. 5 W. 4.

(*o*) Carson v. Dowding & an. 4 Dowl. P. C. 297. See *ante* pa. 54.

(*p*) Reg. Gen. (44) Mar. Ass. 2 W. 4.

thereon shall be so delivered. The practice is, to deliver a copy of the warrant, which contains a verbatim copy of the process, memorandums, and indorsements; and thus, the above rule of Court, even if not virtually repealed by the Act, is still complied with, as well as the Act itself. The copy must be an exact copy, or the Defendant will be discharged, on entering a common appearance, though the writ itself be right (*p*); and an amendment of the *copy* will not, it seems, be allowed (*q*).

The Sheriff to indorse on the writ the day of its execution. "The Sheriff, or other officer or person, to whom any writ of Capias shall be directed, or who shall have the execution and return thereof, shall, within six days after the execution thereof, whether by service or arrest, indorse on such writ, the true day of the execution thereof; and in default thereof, shall be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as this Court, or one of the Judges thereof, shall direct (*r*)."

If the Sheriff omit to indorse the writ, as required by this rule, the remedy is to call upon him to amend his return, and make compensation for the damages arising from his default (*s*)."

Defendant's remedy for overcharge of a Sheriff's officer. "If any Sheriff's officer shall, under any pretence whatever, take from a Defendant, on the execution of any bailable process, a larger sum than is allowed by this Court, the Sheriff shall, by an order of this Court, or one of the Judges thereof, be compelled to refund to the Defendant, the amount of any such overcharge, together with the costs of any application that may be made for

(*p*) Thus, for *mis-spelling*; as *Middesex* for *Middlesex*. (*Hodgkinson v. Hodgkinson*, 2 Dowl. P. C. 535; though some doubt was thrown on this decision in *Colston, v. Berends*, 3 Dowl. P. C. 253, and 1 Cr. M. & R. 833; and see *Sutton, v. Burgess*, Id. 770, 3 Dowl. P. C. 489, S. C.): *Omission of words*—(See *Smith v. Pennel*, 2 Dowl. P. C. 654; *Perring and others v. Turner*: 3 Id. 13. but see *Pocock v. Mason*, 5 M.; and *Scott 51*, and 1 Bing. N. C. 245, S. C. *Forbes v. Mason*, 3 Dowl. P. C. 104). *Mistake in the date*—(See *Byfield v. Street*, 10 Bing. 27. 2 Dowl. P. C. 739, S. C.) *Misdirection*—(See *Barker v. Weedon*, Id. 707; and 1 Cr. M. & R. 396 S. C.; *Nicol v. Boyne*, 2 Dowl. P. C. 761; and 3 M. & Scott, 812, S. C.; 10 Bing. 339, S. C.)

(*q*) *Byfield v. Street. Supra.*

(*r*) Reg. Gen. (7) Mar. Ass. 5 W. 4.

(*s*) *Moore v. Thomas*, 2 Dowl. P. C. 760 & 3, M. & Scott, 810. S. C. and see *Ridley v. Weston*, 2 M. & Scott, 724.

"that purpose ; provided such application be made during
 "the time such Sheriff remains in office, or within a month
 "afterwards (s)."

If the Defendant cannot be taken on the writ of Capias ^{Alias & Pluries} within the four months that it has to run, the Plaintiff ^{Capias.} may issue an *alias capias*, and afterwards (if necessary), a *pluries capias*, or he may proceed to outlawry (t).

The writs of *alias* and *pluries* are dated, tested, issued, and executed, and are required to have the like memorandum, warning, and indorsements, as the first writ ; and must correspond with it. The *alias* may be issued more than four months after the expiration of the first writ, without affecting its validity ; and the entry of continuances, necessary to connect the first writ with the *alias*, may be entered at any time, unless the writs be issued to avoid the statute of limitations (u).

If the Defendant is in gaol, and the Plaintiff wishes to proceed against him in a bailable action, the statute (v) has prescribed, in that case, a new form of process, called a writ of Detainer—of which, hereafter (w).

We have seen (x) that the Attorney's name and place of residence must be indorsed upon the writ ; and in order to protect Defendants against the issuing of writs without authority, the statute 4 and 5, W. IV., c. 62, s. 13, provides, that "every Attorney whose name shall be so indorsed, shall, on demand in writing, made by or on behalf of, any Defendant, declare forthwith whether such writ has been issued by him, or with his authority, or privy ; and, if he shall answer in the affirmative, then, he shall also, in case this Court, or one of the Judges thereof, shall by rule or order, so order and direct, declare in writing, within a time to be allowed by such Court or

Attorney to declare whether the writ issued by his authority ; and the name and place of abode of the Plaintiff, if ordered.

(s) Reg. Gen. (49) Mar. Ass. 2 W. 4. And as to what fee is payable to the officer by the party arrested, see *Innes v. Levy*, 4 Dowl. P. C. 116

(t) 4 and 5, W. 4, c. 62, s. 5 and 8, and see post, B. 5, c. 17, on Outlawry.

(u) See ante pa. 63.

(v) 4 and 5, W. 4, c. 62, s. 7.

(w) See proceedings against prisoners, post B. 4, ch. 4.

(x) See ante pa. 56, And see form of indorsement, ante pa. 67.

"Judge, the profession, occupation, or quality, and place of abode, of the Plaintiff, on pain of being guilty of a contempt of the said Court." Under this section, it seems, that an Attorney who gives a false address, without having made proper inquiries, will be ordered to pay the costs occasioned thereby, as well as the costs of an application to stay the proceedings (x). The answer that the Plaintiff resides at "*Peel's Coffee-house, Fleet-street,*" is not sufficient (y).

The above section further provides, that "if such Attorney shall declare, that the writ was not issued by him, or with his authority or privity, the said Court, or any Judge thereof, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any Defendant or Defendants, who may have been arrested on any such writ, on entering a common appearance." And in furtherance of this provision it is ordered, by a late rule (z), that "if any Attorney shall, as required by the Act, declare that any writ of Summons, or writ of Capias, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings on the same shall be stayed, until further order."

SECT. 3.

OF DEPOSIT, ETC., OF MONEY IN LIEU OF BAIL.

Depositing money with the Sheriff under 43 Geo. 3, Ch. 46. It may not be improper to notice here, the practice of this Court, in the case of a Defendant, who, *in lieu of giving bail to the Sheriff*, deposits in his hands, the sum indorsed on the writ by virtue of the affidavit for holding to bail, together with ten pounds for costs, pursuant to statute 43, Geo. III., c. 46; and also in the case of a Defendant paying money into Court, under statute 7 and 8, Geo. IV. c. 71, in lieu of filing *special bail*.

(x) *Neal v. Holden*, 3 Dowl. P. C. 493.

(y) *Hodson v. Gamble*, Id. 174.

(z) Reg. Gen. (4) Mar. Ass. 5, W. 4.

Where money has been deposited with the Sheriff, under the former of these statutes, he should pay it into Court within eight days after the arrest (inclusive of the day of arrest); and if the Defendant file special bail within the same period, he is entitled to have the money re-paid to him, (a) on the bail being perfected (b), or the Defendant's being surrendered (c). Paying it out of Court to the defendant.

Although the statute 43, Geo. III., c. 46, speaks of the money being payable out of Court, on *motion*, yet the Prothonotary is empowered to grant a rule *nisi*, for that purpose (d). To obtain such Rule by the Defendant an affidavit should be produced, stating the time of the arrest—the deposit, and payment into Court—and that special bail has been put in and perfected, or the Defendant surrendered, in due time: but where the affidavit did not state that the bail was perfected *in due time*, it was held sufficient, the contrary not being shewn (e).

If special bail be not duly perfected, or the Defendant rendered, the Plaintiff is entitled to receive the money out of Court; and this, it seems, will be allowed where the Defendant has been rendered, since the time for putting in bail, if there be no affidavit of merits (f). To the Plaintiff

A rule *nisi* for the Plaintiff to receive the money, may likewise be had from the Prothonotary (g), on an affidavit stating the time of the arrest—the deposit and payment into Court—and the Defendant's default in putting in and perfecting bail. But the payment of the money to the Plaintiff, is to be subject to such deductions (if any) from the £10. deposited for costs, as upon taxation of his costs, as well of the suit, as of the application to the Court in that behalf, may be found reasonable (h).

(a) See *Geach v. Coppin*, 3 Dowl. P. C. 74.

(b) As to the time and mode of perfecting Bail, see Ch. 3 of this book.

(c) *Harford & others v. Harris*, 4 Taunt. 669. *Chadwick v. Battye*, 3 Maule & S. 283.

(d) Reg. Gen. Mar. Ass. 57 Geo. 3.

(e) *Young v. Maltby*, 3 Dowl. P. C. 604.

(f) *Newman & an. Assignees v. Hodgson*, 1 Dowl. P. C. 329; 2 B. & Ad. 422, S. C.

(g) Reg. Gen. Mar. Ass. 57 Geo. 3.

(h) 43 Geo. 3, c. 46. s. 2.

If bail be perfected, but not in time, before the Plaintiff has taken the money out of Court, he must then elect whether he will have the money or the bail; for he cannot have both (i). After receiving the money, he may, if he think fit, enter a common appearance for the Defendant, and thereby be enabled to proceed in the action (j).

Paying money into Court in lieu of *Special Bail*. By statute 7 and 8, Geo. IV., c. 71, s. 2, where money has been deposited with the Sheriff, and by him paid into Court, pursuant to 43, Geo. III., c. 46, the Defendant, instead of putting in and perfecting *special bail*, according to the course and practice of the Court, may pay into Court the further sum of ten pounds, as a further security for costs, there to remain to abide the event of the suit: or, where a Defendant shall have given bail to the Sheriff on arrest, or remain in custody, he may, instead of putting in and perfecting *special bail*, deposit and pay into Court the sum indorsed on the writ, and £20. as a security for costs, there to remain to abide the event of the suit; and upon such deposit, the Defendant is required to enter an appearance, or file common bail, within such time as he would have been required to put in and perfect *special bail*, according to the course of the Court; or in default thereof, the Plaintiff may enter an appearance, or file common bail, for the Defendant; and the cause may proceed, as if the Defendant had put in and perfected *special bail*.

It has been held that the words in this clause "within such time as the Defendant would have been required to put in and perfect bail according to the course and practice of the Court," comprehend the whole time, till the last day for *perfecting special bail* (k).

It has not been the practice to take out a rule to pay money into Court, under the above provision of the statute (l). the money is paid to the Prothonotary, who, if re-

(i) *Geach v. Coppin*, 3 Dowl. P. C. 74.

(j) 43 Geo. 3, c. 46, s. 2.

(k) *Rowe v. Sofly*, 6 Bing. 634. 4 Moore & P. 464, S. C. *Straford v. Lowe*, 3 Dowl. P. C. 593.

(l) But *quære* whether a Rule should not be taken out, as is the practice of the Courts at Westminster.

quired, will grant a certificate thereof, which may be necessary if the Defendant is in custody, in order to obtain his discharge. Notice of the deposit should be given to the Plaintiff's attorney; and it is usual for the Defendant to enter an appearance.

After the Plaintiff has obtained judgment, or something equivalent to it (*m*), he is entitled, by order of the Court, upon *motion*, to receive the money so deposited, or so much as will be sufficient to satisfy the sum recovered by the judgment, and the costs of the application; and if judgment be given for the Defendant, or the Plaintiff discontinue his suit, or be otherwise barred, or if the sum deposited be more than sufficient to satisfy the Plaintiff, the money so paid into Court, or so much as shall remain, will, by order of the Court, upon *motion*, be repaid to the Defendant (*n*). If the money deposited is insufficient to satisfy the Plaintiff, he may, after judgment, issue an execution; but he must limit it to the difference, between the sum paid into Court, and the sum recovered (*o*). Application for the money out of Court after judgment, &c.

The statute 7 & 8 Geo. IV., c. 71, like the 43 Geo. III., c. 46, directs that the money shall be paid out of Court, on *motion*; and as there is no general rule of Court, authorizing the Prothonotary to issue a rule nisi, to pay over the money under the former act, as there is under the latter, the application must, it seems, be made to the Court, by *motion* (*p*).

A Defendant who has put in and perfected special bail, may, upon *motion*, pay into Court, the sum which would have been deposited, in case he had originally elected to do so, together with such further sum for costs as the Court may direct, to abide the event of the suit; and thereupon the Court may direct a common appearance to be entered, and an exoneretur on the bail-piece (*q*). After perfecting Bail, defendant may deposit in Court.

(*m*) *Johnson v. Wall*, 4 Dowl. P. C. 815.

(*n*) 7 & 8 Geo. 4, c. 71, s. 2. A rule nisi only, will be granted in the first instance; *Grant v. Willie*, 4 Dowl. P. C. 581.

(*o*) *Hews v. Pyke*, 1 Dowl. P. C. 322; and 2 Cr. & J. 359, S. C.

(*p*) See *Geach v. Coppin*, 3 Dowl. P. C. 74; and see post pa. 316, as to when the *motion* may be made.

(*q*) 7 & 8 Geo. 4, c. 71, s. 4.

When a defendant may receive the deposit out of Court. A Defendant who has made such deposit, and payment into Court, may, on putting in and perfecting bail, and upon payment of such costs as the Court may direct, receive the money out of Court, by an order for that purpose, at any time "*before issue joined, in law or fact, or final or interlocutory judgment signed*" (r). The application for this purpose, must be made before issue joined, in cases where issue is joined at all; and the words "*before final or interlocutory judgment signed*" apply only to cases of judgment by default or on confession (s).

The Court will not allow money paid into Court, under statute 7 and 8 Geo. IV., c. 71, to be transferred to the account of a payment into Court, on a plea of tender (t): nor will the Defendant be allowed to plead payment into Court of a less sum, without paying in the money (u).

(r) 7 & 8 Geo. 4, c. 71, s. 3.

(s) *Hanwell v. Mure*, 2 Dowl. P. C. 155; and see *Ferrall v. Alexander & an.* 1 Id. 132.

(t) *Stultz v. Heneage*, 10 Bing. 561. 4 M. & Scott, 472, S. C.

(u) *Ball v. Stafford*, 4 Dowl. P. C. 327; but see *Hubbard v. Wilkinson*, 8 B. & C. 496.

BOOK 2. CHAP. II.

OF APPEARANCE; AND THE PROCESS OF DISTINGAS FOR
COMPELLING IT.

It is provided by statute 4 and 5, W. IV., c. 62, s. 9, that "when any writ of Summons, Capias, or Detainer, issued by authority of that Act, shall be served or executed, all necessary proceedings to judgment and execution may be had thereon, without delay, at the expiration of *eight* days from the service or execution thereof; provided always, that if the last of such eight days shall, in any case, happen to fall on a *Sunday, Christmas-day, Good Friday,* or any day appointed for a public fast or thanksgiving, in any of such cases, the following day shall be considered as the last of such eight days." And it is also provided, by the 12th section, that "all such proceedings as are mentioned in any writ, notice, or warning, to be issued as aforesaid, under the Act, shall and may be had and taken in default of a Defendant's appearance, or putting in special bail, as the case may be." The Plaintiff cannot, however, proceed to judgment until the Defendant (if not in custody) is in Court either by an appearance being entered, or special bail filed: and it is proposed, in the present chapter, to consider the former of these modes of bringing a Defendant into Court; and, as incidental thereto, the proceeding by *distingas*, to compel an appearance.

SECT. 1.

The Defendant *may* appear immediately after the execution of serviceable process; and he *must* do so, within a certain time afterwards, or the Plaintiff may appear for him; according to the statute (a). Appearance, necessary to enable the plaintiff to proceed to judgment.

(a) See post pa. 79.

The writ of *Summons* commands the Defendant to appear thereto, "within eight days after service" thereof: "inclusive of the day of such service"—thus, if served on the 1st, he should appear, at the latest, on the 8th, unless that happen to be Christmas day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case, he has the following day to appear in (b).

Distringas or
Capias.

The notice subscribed to the writ of *Distringas* directs an appearance to be entered "within eight days inclusive after the return" of such writ (c); and the writ of *Capias*, when used against some of the Defendants as serviceable process, requires by its warning, the Defendant so served, to appear "within eight days after such service" (d): this warning, however, does not state that the day of service is to be reckoned inclusively; but by a rule of this Court (e), it is ordered, that "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of this Court, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case, the time shall be reckoned *exclusively* of that day also."

After a deposit
of money with
the Sheriff under
43 Geo. 3.
c. 46. or

After payment
in Court, under
7 & 8 Geo. 4, c.
71

Where a Defendant on being arrested, instead of giving a bail-bond, deposits with the Sheriff, the sum indorsed on the writ, with £10. to answer the costs, pursuant to the statute 43, Geo. III., c. 46, s. 2, and special bail is not duly put in, the Plaintiff may, on a proper application (f), obtain the money out of Court, and (if he think fit) enter a common appearance, and so proceed in the action: and where money is paid into Court in lieu of special bail, pursuant to statute 7 and 8, Geo. IV., c. 71, the Defendant must enter a common appearance within the time allowed for perfecting special bail (g), or in default thereof, the Plaintiff may appear for him.

(b) See ante pa. 77.

(c) See post pa. 82.

(d) See form of the writ of *Capias* ante pa. 66.

(e) Reg. Gen. (65), Mar. Ass. 2 W. 4. extended to proceedings under 4 & 5 W. 4. c. 62, by Reg. Gen. (1) Mar. Ass. 5 W. 4.

(f) See ante pa. 73.

(g) See ante pa. 74.

As to the time for appearing to actions of ejectment, and replevin; and to causes removed from inferior Courts, see the respective titles. Appearance in particular actions.

To appear for an Infant, a rule to defend by guardian must be obtained, which is granted by the Prothonotary, on producing the infant's petition, and guardian's consent, both of which must be drawn up, and verified by affidavit, as is required by the practice of the Common Pleas at Westminster: but "a special admission of *prochein amy*, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any "but the particular action or actions specified (h)." The rule for admitting the guardian to defend, is absolute in the first instance. It is not served on the opposite party, being merely entered in the Imparance-book, kept by the Prothonotary. For Infants.

If the Defendant do not appear within the periods before mentioned, the Plaintiff may appear for him, according to the statute; after which, the Defendant's appearance is of no avail (i). The Defendant may, however, appear after the time limited, before an appearance by the Plaintiff is actually entered: but an appearance by either party should be entered within a year after service of the process (j). And by Plaintiff, sec. stat.

The statute which authorises the *Plaintiff* to appear in this Court, is the 22nd, Geo. II., c. 46, s. 35, which is yet in force, so far as it requires an affidavit of personal service of the process to be filed with the Prothonotary, on the entry of such appearance, but with respect to the kind of process to which such appearance may be entered, and the time of entering it, an alteration has been made by statute 4 and 5, W. IV., c. 62; and though an appearance by the Plaintiff, may now be said to be entered according to both these statutes, yet, the old mode of expression "according to the statute," is still adhered to (k).

(h) Reg. Gen. (2) Mar. Ass. 2 W. 4.

(i) *Davis v. Cooper*, 2 Dowl. P. C. 135.

(j) *Cook v. Allen*, 1 Dowl. P. C. 676, see also Reg. Gen. (21) Mar. Ass. 2, W. 4, and see post, B. 5, ch. 7.

(k) See the memorandum of appearance as prescribed by the last-mentioned Act, post pa. 81.

Affidavit of service of writ of Summons.

The affidavit of service (i) of the writ of Summons, the form of which is given below (j), must show that the person who served the writ, did within three days after service, indorse thereon, the day of the week and month of such service, otherwise the Plaintiff will not be allowed to enter an appearance pursuant to the statute; and every affidavit upon which such an appearance shall be entered, must mention the day on which such indorsement was made (k). But where the Defendant improperly gets possession of the writ of Summons, the Court will allow an appearance to be entered without such indorsement, and order the Defendant to pay the costs (l).

An affidavit is not necessary to enable a Plaintiff to appear for a Defendant, who has neglected to do so, after a payment of money into Court in lieu of bail, under the 7 and 8, Geo. IV., c. 71, s. 2 (m): nor, it would seem, when the Defendant has neglected to file special bail, after depositing money on arrest in the Sheriff's hands, pursuant to 43, Geo. III., c. 46.

Mode of entering an appearance.

The mode of entering an appearance to a writ of Summons, or under the authority of statute 4 and 5, W. IV.,

(i) As to what constitutes service, see ante pa. 61—2.

Form of affidavit of service of writ of Summons.

(j) *Affidavit of service of a Writ of Summons.*

In the Common Pleas at Lancaster.

Between A. B. Plaintiff,
and

C. D. Defendant,
G. H. of clerk to E. F., Gentleman, Attorney for the above-named Plaintiff, maketh oath and saith, that he this deponent, did on the day of instant, (or last) personally serve the above-named defendant with a true copy of a writ of Summons, and of the memorandum subscribed thereto, and indorsements made thereon, and which writ of Summons appeared to this deponent to have been regularly issued out of, and under the seal of this honourable Court, against the said defendant, at the suit of the said plaintiff, on the day of instant, (or last); And this deponent further saith, that he did on the day of instant, (or last), indorse on the said writ the day of the week and month of such service.

G. H.

Sworn, &c.

Before a Commissioner for taking affidavits in the said Court [not being the Plaintiff's Attorney, or his Clerk.]

(k) Reg. Gen. (6) Mar. Ass. 5 W. 4.

(l) *Brook v. Edridge*, 2 Dowl. P. C. 647.

(m) *Atherton's Tr.* pa. 53.

APPEARANCE.

c. 62, is, by the 2nd section of this Act, required to be "by delivering to the Prothonotary, or his deputy, a memorandum in writing, dated on the day of delivery thereof, according to the form contained in the Schedule to the Act, marked No. 2 (m);" and when an appearance is entered by the Defendant's attorney, notice thereof must be given to the Plaintiff's attorney, or agent.

SECT. 2.

DISTRINGAS TO COMPEL AN APPEARANCE.

In proceeding against an absent Defendant, and also against Peers, Members of Parliament, or Corporations, to compel an appearance, the practice of this Court used to be, to proceed by original Writ, Summons, and *Distringas*, for the purpose of attaching the Defendant by his goods; and the proceedings under the *Distringas* were in conformity with those of the superior Courts at Westminster, as regulated by the statutes 45, Geo. III., c. 124, s. 3 & 51, Geo. III., c. 124 (n). Former practice on proceeding by *distringas*.

The above practice has been altered by the statute 4 and 5, W. IV., c. 62, s. 3 (o), whereby it is enacted, "that in case it shall be made appear by affidavit, to the satisfaction of this Court, or one of the Judges thereof, that any Defendant has not been personally served with any writ of Summons, and has not, according to the exigency Present practice

(m)

Forms for entering an Appearance.

A. B. Plaintiff against C. D.
or
against C. D. and another,
or
against C. D. and others

{

The Defendant C. D., appears in person.
E. F., attorney for C. D. appears for him.
G. H., attorney for the plaintiff appears for the defendant C. D. according to the statute.

Memorandum of appearance.

Entered the day of one thousand eight hundred
and

(n) See Evans' pr. 25. but the statute 51 Geo. 3. c. 124. seems to be confined to the Courts at Westminster.

(o) See also sect. 5 of the Act.

"thereof appeared to the action, and cannot be compelled
 "so to do without some more efficacious process, then,
 "and in any such case, it shall be lawful for such Court or
 "Judge, by rule or order, to order a writ of *Distringas* to
 "be issued, directed to the Sheriff of the said County of
 "*Lancaster*, (or to any other officer to be named in such
 "rule or order), to compel the appearance of such De-
 "fendant, which writ of *Distringas*, shall be in the form
 "and with the notice subscribed thereto, mentioned in
 "the Schedule to the Act, marked No. 3 (p)."

The object of
 the *distringas*
 must be shewn
 on applying for
 it.

It will be seen from the form of the writ, that the Plain-
 tiff may use it either to compel an appearance, or to pro-
 ceed to outlaw the Defendant, (if he be subject to outlawry):
 but the Plaintiff must elect as to the purpose for which he
 seeks to obtain the *Distringas*; for he cannot issue it in
 the alternative; and where there is reason to believe that
 the Defendant is abroad, a *Distringas* to compel an ap-

(p) *Form of the writ of Distringas, as prescribed by the act:—*

Writ of *distrin-*
gas.

William the Fourth, &c. To the Sheriff of Lancashire greeting: We
 command you, that you omit not by reason of any liberty in your bailiwick,
 but that you enter the same and distrain upon the Goods and Chattels of
 C. D., for the sum of *forty* shillings, in order to compel his appearance
 in our Court of Common Pleas at Lancaster, to answer A. B. in a plea of
Trespass on the Case, [or debt, as the case may be]; and how you shall
 execute this our writ, you make known to our Justices at Lancaster, on
 the day of [being not less than 15 days after the teste of the
 writ] now next ensuing. Witness [the Chief Justice of this Court] at
 Lancaster, the day of [the day of issuing], in the year of
 our Reign.

Notice to be subscribed to the foregoing writ.

In the Court of Common Pleas at Lancaster:

Between A. B. Plaintiff
 and

C. D. Defendant.

Mr. C. D.—Take notice, that I have this day distrained upon your Goods
 and Chattels in the sum of *forty* shillings, in consequence of your not
 having appeared in the said Court to answer to the said A. B., according
 to the exigency of a writ of Summons bearing teste on the day of
 and that in default of your appearance to the present writ within eight
 days inclusive after the return hereof, the said A. B. will cause an ap-
 pearance to be entered for you, and proceed thereon to judgment and exe-
 cution; [or if the defendant be subject to outlawry, will cause proceedings
 to be taken to outlaw you].

[Indorse, as on the writ of Summons, the name of the attorney, agent,
 or party, who issues the writ; and also the amount of debt and costs; see
 ante pa. 57, but see post page 85. The costs are not fixed by Rule of Court,
 as in other cases; but the amount thereof should not exceed the ordinary
 allowance].

pearance will not be allowed; so on the other hand, where he is not abroad, a *Distingas* for the purpose of outlawry will not be granted; one state of circumstances or other must be made out (q).

The application for a *Distingas* cannot be made, until the expiration of eight days after a copy of the writ of Summons has been left for the Defendant, on the last attempt to serve him personally (r). It must be supported by an affidavit; and where the residence of the Defendant is known, such affidavit must show, that *three* calls, at least, have been made at the Defendant's residence, to serve him with the writ of Summons (s), stating the tenor of such writ, in *hæc verba* (t), and the residence of the Defendant (tt); that at each of the two first calls the deponent apprized the person whom he saw, (and who should appear to have some connexion with the Defendant, (u)) of the nature of the business (v); that at the first and second calls, the day and hour on which the next would be made, were mentioned (w); and, that at the third and last call, (which must appear to have been made eight days at least before the application for the *Distingas*), a copy of the writ of Summons was left at the Defendant's residence (x). The answers given to the different applications should be stated (y); and it must appear that the Defendant was at home, or in the neighbourhood, when the party called to serve him (z). If the answer given be, that the Defendant is out of town, the affidavit should state that inquiries have been made in

Time for moving for, and Affidavit to obtain, a *distingas*, where the defendant's residence is known.

(q) *Fraser v. Case*, 9 Bing. 464. 2 Moore & S. 720, S. C. 1 Dowl. P. C. 725, S. C.; but see *Hornby v. Bowling*, 11 Moore, 369. *Gurney v. Hardenberg*. 1 Taunt. 487.

(r) *Brian v. Stretton*, 1 Cr. & M. 74. 3 Tyr. 163, S. C. 1 Dowl. P. C. 642, S. C.

(s) *Anon.* 1 Dowl. P. C. 513. 1d. 554. *Pitt v. Eldred* 1 Cr. & J. 147.

(t) *Hill v. Wilkinson*, 4 Taunt. 619. *Hannam v. Dietrichsen*, 5 Taunt. 853.

(tt) *Bowser & ors. v. Austen*, 2 Tyr. 164. 2 Cr. & J. 45, S. C.

(u) *Winstanley v. Edge*, 1 Cr. & J. 384.

(v) *Johnson v. Rouse*, 1 Cr. & M. 26, 1 Dowl. P. C. 641. S. C. 3 Tyr. 161, S. C. *Pitt v. Eldred*, *supra*.

(w) *Johnson v. Disney*, 2 Dowl. P. C. 400. *Wills v. Bowman*, 1d. 413.

(x) *Brian v. Stretton*, *supra*. *Street v. Lord Alvanley*, 3 Tyr. 162. 1 Dowl. P. C. 638. 1 Cr. & M. 27, S. C.

(y) *Fisher v. Goodwin*, 2 Cr. & J. 94. 2 Tyr. 164, S. C.

(z) *Price v. Bower*, 2 Dowl. P. C. 1. *Whitehorne v. Simone*, 1 Tyr. 233. 1 Cr. & J. 402, S. C.

the neighbourhood, to learn whether any person has seen him, and that there is reason to believe such answer is false : for if true, a *Distringas* would not be granted (a) unless grounds be shewn, to satisfy the Court, that the Defendant keeps out of the way to avoid service (b). Service of the writ of Summons at the office of an employer is not sufficient (c) ; nor will it suffice to leave a copy of the writ, at any but the last call (d). The three calls need not be made by the same person (e), but should be made on different days (f) ; unless it appear that the Defendant is purposely keeping out of the way (g). The Affidavit must also state that the Defendant has not appeared ; that it is believed he keeps out of the way to avoid being served, with the reasons for such belief ; and, that he cannot be compelled to appear, without some more efficacious process.

Where the defendant's residence is not known.

Where the Defendant's residence is not known, the affidavit must shew that endeavours have been made to serve him personally, with the writ of Summons. What will be considered sufficient endeavours, to entitle the Plaintiff to a *Distringas* in such case, does not appear to have been yet decided (h). A *Distringas* for the purpose of outlawry, may be obtained, under circumstances which would not entitle the Plaintiff to a *Distringas* to compel an appearance (i).

Order for *distringas*.

The Judge's order for the *Distringas* is left with the Prothonotary, on his signing the writ ; and he makes the order a rule of Court, which, however, is not served.

Issuing teste and return of the writ, and the indorsements thereon.

The contents of the *Distringas* will be seen from the form of it given above, and which form must be strictly followed. The writ must be indorsed with the name of the Plaintiff, or his attorney, and be tested in the same

(a) Smith & ors. v. Hill, 2 Dowl. P. C. 225. Waddington v. Palmer, 1d. 7. Winstanley v. Edge, 1 Cr. & J. 581.

(b) Simpson v. Lord Graves, 2 Dowl. P. C. 10.

(c) Thomas v. Thomas, 2 Moore & S. 730.

(d) Hill v. Moule, 1 Cr. & M. 617 ; 2 Dowl. P. C. 10 S. C. Smith v. Good, 1d. 398.

(e) Smith v. Good, *supra*.

(f) Cross v. Wilkins, 4 Dowl. P. C. 279.

(g) White v. Western, 2 Id. 451 ; but see Cross v. Wilkins, *supra*.

(h) See 1 Dowl. P. C. 555, & Saunderson v. Bourn, 2 Id. 398.

(i) Hewitt v. Melton, 3 Tyr. 822. Jones v. Price, 2 Dowl. P. C. 42.

manner as a writ of Summons (j) ; and, although the rule (2) of March Assizes, 5, W. IV. (k), requiring the indorsement of the amount of debt and costs, does not expressly mention the writ of *Distringas*, yet it seems proper to make such indorsement. The writ is required, by the Act, to "be made returnable on a day certain, to be named therein, not being less than fifteen days after the teste thereof." It is made out by the party—signed by the Prothonotary—afterwards sealed on a docket obtained from the Cursitor—and then lodged with the Sheriff : and the Act requires that "a true copy of every such writ and notice, shall be delivered, together therewith, to the Sheriff, or other officer, to whom such writ shall be directed." The Sheriff grants a warrant thereon, directed to his officers ; and the party hands it to the officer.

The statute directs that the "writ of *Distringas* and notice, or a copy thereof, shall be served on the Defendant, Execution of the writ.
"ant, if he can be met with ; or if not, shall be left at the place where such *Distringas* shall be executed," that is, where the goods of the Defendant shall be distrained (l) ; and to enable the officer to swear to such service, the writ will be allowed to be sent to him, by the Attorney on his undertaking to return it to the Sheriff. The writ may be executed at any time before or on the return-day ; but cannot be executed out of the county (m) : and though it requires the Sheriff to distrain for the sum of *forty* shillings, yet, where the officer levies less than that sum, and it appears, by affidavit, that it was all the property on the premises, this is a sufficient execution, to entitle the Plaintiff to enter an appearance (n). It would also seem to be sufficient to serve the Defendant personally with the writ, without distraining on his goods (o).

If the *Distringas* shall have been executed, either by Appearance after personal service, or distress, or both (p) ; and the Defendant execution.
ant do not appear within eight days, inclusive, after the

(j) See ante pa. 60.

(k) See ante pa. 57.

(l) Atherton's Tr. 57.

(m) See ante pa. 62.

(n) Jones v. Dyer, 2 Dowl. P. C. 445.

(o) Atherton's Tr. 57. 58.

(p) Id 59.

return thereof, the Plaintiff may, without previous leave of the Court (g), enter an appearance for him, upon an affidavit of such execution (r) : or, it seems, the Sheriff's return of levy would be sufficient to warrant the Plaintiff to enter an appearance, without an affidavit of execution (s).

Appearance when the *distringas* cannot be executed.

"If such writ of *Distringas* shall be returned *non est inventus* AND *nulla bona*, and the party issuing out such writ, shall not intend to proceed to outlawry, or waiver, according to the authority thereafter given (t) ; and any Defendant against whom such writ of *Distringas* issued shall not appear at, or within eight days inclusive after, the return thereof, and it shall be made appear by affidavit, to the satisfaction of this Court, or one of the Judges thereof, that due and proper means were taken and used to serve and execute such writ of *Distringas*, it shall be lawful for such Court, or Judge, to authorise the party suing out such writ, to enter an appearance for such Defendant, and to proceed thereon to judgment and execution (u)."

The return of *non est inventus* and *nulla bona* is not alone sufficient to entitle the Plaintiff to an appearance (v) ; though it will suffice for the purpose of proceeding to outlawry (w). It is difficult to point out a given form of affidavit (x) to satisfy the Court, or Judge, that "due and proper means" have been used to execute the writ, as the sufficiency of those means will depend upon the peculiar circumstances of each case. It must, however, clearly appear, by the affidavit, that the Defendant cannot be met with—that he has no goods on which the *Distringas* can be executed (y), and that every means to find him, or give him notice, have been tried, and what those means are (z). And the Court,

(g) *Johnson v. Smealey*, 1 Dowl. P. C. 526.

(r) See form of such affidavit, Tidd (1833), pa. 280 ; Wordsworth, 125. Chitty's forms, 345.

(s) *Page v. Hemp*, 4 Dowl. P. C. 203.

(t) See post B. 5 c. 17 ; as to proceedings to outlawry.

(u) 4 & 5 W. 4. c. 62, s. 3.

(v) *Daniels v. Varity*, 3 Dowl. P. C. 26

(w) *Jones v. Price*, 2 Dowl. P. C. 42.

(x) For form of affidavit under supposed circumstances, see Tidd, (1833) pa. 280. Wordsworth, pa. 126, & Chitty's Forms, 346-7.

(y) *Cornish v. King*, 2 Dowl. P. C. 18. 3 Tyr. 575. S. C.

(z) *Scarborough v. Evans*, 2 Dowl. P. C. 9. *Saunderson v. Bourn*, Id, 338. *Balgay v. Gardner*, Id. 52,

it seems, will look at the steps previously taken by the Plaintiff, in order to entitle him to a *Distringas* (y). Where, however, three attempts to serve the *Distringas* had been made, which had been rendered ineffectual by the conduct of the Defendant, or his agents, the Court allowed an appearance to be entered (z).

(y) See 1 Dowl. P. C. 555.

(z) *Tring v. Gooding*, 2 Dowl. P. C. 162.

BOOK 2. CHAP. III.

OF SPECIAL BAIL.

When to be filed. Before the Stat. 4 & 5, W. IV., c. 62, Special Bail must have been filed within eight days next after the return of the writ, otherwise proceedings might have been taken against the Sheriff, or on the Bail-bond (*a*) : but by this statute, the Defendant, in order to prevent such proceedings, should file special bail within eight days after the arrest, the day of arrest being reckoned inclusive (*b*). Thus, where the arrest is on the 1st, bail should be filed on the 8th, unless it happen to be Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case, the following day is allowed (*c*). Special bail may, however, be filed in any stage of the cause, even after verdict or final judgment, provided the Defendant be not charged in execution (*d*).

Qualification of Bail. The general qualification of special bail in this Court is, that they shall be *Housekeepers* or *Freeholders*, within the county ; and persons who are incompetent as bail in the Courts at Westminster, are equally so, in this Court, except for the mere purpose of surrender.

Number of sureties. There must, in general, be *two* sureties at the least ; and "notice of more bail than two, shall be deemed irregular, unless by order of this Court, or one of the Judges thereof (*e*) ; but which order will be granted, where the Defendant is poor, or the sum considerable (*f*).

(*a*) The time for filing Bail upon writs returnable on the monthly returns, was regulated by Stat. 22 Geo. 2, c. 46, s. 35 ; and on writs returnable at an Assizes, by Reg. Gen. (8), Mar. Ass. 2 W. 4.

(*b*) See the form of the *Capias*, ante pa. 66.

(*c*) See ante pa. 77.

(*d*) Stanton's Bail, 2 Chitt. Rep. 73. Tidd's prac. [9th Ed.], 248.

(*e*) Reg. Gen. [9] Mar. Ass. 2 W. 4.

(*f*) *Easter v. Edwards*, 1 Dowl. P. C. 39.

The recognizance must, in all cases, be taken in double the sum sworn to by the affidavit of debt, except where the sum amounts to £1000. or upwards; and then, in £1000. beyond the sum sworn to (g). Amount of their recognizance.

The nature of the recognizance is, that the bail jointly and severally acknowledge to owe to the Plaintiff, the sum in which they are bound, on condition that if the Defendant be condemned in the action, they shall pay the condemnation money, or render his body to prison. Nature of their recognizance.

The bail, however, are "only liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the whole, the amount of their recognizance" (h); and the words "amount of their recognizance," in this rule, have been held to mean, the amount of each of their recognizances, and not of the two separate recognizances added together (i). Extent of the liability.

The form of recognizance is given below, as are also forms of the affidavits of caption and justification (j). Form of recognizance.

- (g) Reg. Gen. (12) Mar. Ass. 2 W. 4.
 (h) Reg. Gen. (13) Mar. Ass., 2 W. 4.
 (i) Vansandau & an. v. Nash, 2 Dowl. P. C. 767. 3 M. & Scott, 834, S. C.
 (j) *Form of the Recognizance.*

<p>Clarendon. Lancashire to wit. J. K. defendant's attorney.</p>	}	<p>August Assizes, 6th William 4th. C. D. late of in the said County, is delivered to Bail, on an arrest to E. F., of [to be signed here] E. F. and G. H., of [to be signed here] G. H.</p>
At the suit of A. B.,		
<p>Taken and acknowledged at P., in the County afore- said, the day of 1836, Before me J. F. H. a Commissioner.</p>	}	<p>The Bail in £100 severally. [This is supposing the affi- davit of Debt to be for £50].</p>

[Form of Affidavit of Justification as prescribed by Rule (9) of Mar. Ass. 5 W. 4.]

In the Common Pleas at Lancaster.

Between A. B.Plaintiff,
 and

C. D.Defendant.

E. F., * one of the Bail for the above-named defendant, maketh

* The addition of the bail should be stated, though there is no blank for it in the form; see Treasure's bail, 2 Dowl. P. C. 670, & see Reg. Gen. (3) Mar. Ass. 2 W. 4.

is not necessary for the Defendant to be a party to the recognizance; but he is sometimes made a party, and

oath and saith, † that he is a housekeeper, ‡ [or "freeholder," as the case may be], residing at § [describing particularly the street or place, and number if any] ¶ that he is worth § the sum of [the amount required by the practice of the Court], ¶ over and above all his just debts, [if bail in any other action add "and every other sum for which he is now bail"]; that he is not bail for any defendant except in this action, [or if bail in any other action or actions, add "except for C. D., at the suit of E. G., in the Court of in the sum of for G. H., at the suit of J. K., in the Court of in the sum of " specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail]; that the deponent's property to the amount of the said sum of [and if bail in any other action or actions, "of all other sums for which he is now bail as aforesaid"], consists of [here specify the nature and value of the property in respect of which the bail proposes to justify as follows: ** "Stock-in-trade in his business "of carried on by him at of the value of of good "book debts owing to him, to the amount of of furniture in his "house at ** of the value of of a freehold or leasehold farm of "the value of situate at occupied by or of a "dwelling-house of the value of situate at occupied by or of other property particularising each description of property, with the value thereof]; and that the deponent hath for †† the last six months resided at [describing the place or places of such residence]. Sworn, &c., [Before me, a Commissioner for taking Special Bail in the said Court].

† The affidavit may be joint, though the form is several. Anon. 1 Dowl. P. C. 115.

‡ "Householder" is not sufficient. Anon. 1 Dowl. P. C. 127, and if described as "housekeeper" when he is not so, though he turns out to be a freeholder, the affidavit is insufficient under the Rule. Wilson's Bail, 2 Dowl. P. C. 431.

§ To state that the bail is a "housekeeper at" &c., and not that he resides there, is not sufficient to entitle the defendant to the costs of justification, Heald's bail, 3 Dowl. P. C. 423; and the actual, and not the mere constructive residence must be stated. Thomson v. Smith, 1 Dowl. P. C. 340.

¶ Where the number was omitted, but the bail had been found and no other ground of opposition was made, they were allowed to justify on paying the costs of opposition. Muir v. Smith, 2 Tyr. 742.

§ "Possessed" instead of "worth" is insufficient; and the affidavit will not be allowed to be amended in this particular. Naylor's bail, 3 Dowl. P. C. 452.

¶ See ante pa. 89.

** It must be stated where the property is. Cooper's bail, 3 Dowl. P. C. 692.

†† "Within" the last six months is not sufficient. Johnson's bail, 1 Dowl. P. C. 438. Ward's bail, Id. 596. If the bail have had two residences, one only need be mentioned. Anon. 1 Dowl. P. C. 159, and Fortescue's bail, 2 Id. 541.

when that is the case, he should sign the bail-piece, and make acknowledgment.

[Form of the Affidavit of Justification as used before Reg. Gen. (9)
Mar. Ass. 5 W. 4.]

In the Common Pleas at Lancaster..

Between A. BPlaintiff.

and

C. D.....Defendant

* E. F., of in the County of Lancaster, gentleman, and G. H., of the same place yeoman, Special Bail for the defendant, in this cause, severally make oath and say; and first this deponent E. F., for himself saith, that he is a housekeeper, in aforesaid, and is really and truly worth the sum of of lawful money of Great Britain, over and above what will pay all his just debts, and over and above every other sum for which he is now Bail.† And this other deponent G. H., for himself saith that he is a housekeeper, in and is really and truly worth the sum of of like lawful money over and above what will pay all his just debts, and over and above every other sum for which he is now Bail.

Sworn at	aforesaid, by both the	E. F.
deponents E. F. & G. H., this	}	
day of		1836. Before me	G. H.

J. F. H., a Commissioner for taking Special Bail in the said Court.

[Form of the Affidavit of Caption].

In the Common Pleas at Lancaster.

Between A. B....Plaintiff,
and

C. D.Defendant.

O. P., of in the County of Lancaster, gentleman, maketh oath and saith, that the recognizance of bail or bail piece hereunto annexed, was duly acknowledged by E. F., of in the said County, gentleman, and G. H. of the same place, yeoman, the bail therein named, before J. F. H., Esquire, the Commissioner who took the same in this deponent's presence the day of instant.

Sworn at	aforesaid, the	day	}	O. P.
of	in the year of our Lord	1836.		
Before me	T. E., a Commissioner, &c.	†		

* See the notes to the preceding form.

† If the deponent swear that "he is not Bail for any defendant except in this action," it seems to be sufficient. See Hunt's Bail, 4 Dowl. P. C. 272.

‡ Usually a Commissioner for taking Affidavits in this Court: but the Stat. 34 Geo. 3, c. 46, s. 1, empowers the Bail Commissioner to take such Affidavit.

Taking the recognizance and filing the same.

The recognizance is taken either by the Prothonotary, (which it seems was formerly the only way (*k*)), or by a commissioner appointed for that purpose (*l*): it is filed with the Prothonotary, and it is the practice to leave with him, at the same time, a memorandum of the Attorney's retainer to defend. When bail is taken by a commissioner, it must be transmitted to be filed, within ten days after the taking (*m*); but notwithstanding this, the bail must, for the reason before mentioned, be filed within eight days after execution of the writ of Capias. When bail is taken by the Prothonotary, an affidavit of caption is not necessary.

Justifying.

With respect to the *justifying* of special bail, it is provided by statute 34, Geo. III., c. 46, s. 2, "that the Justices of this Court, for the time being, shall and may make such rules and orders for the justifying of bails, and making the same absolute, as to them shall seem meet; so that it may not be necessary for the cognizor or cognizors of any such bail or bails to appear in the said Court to justify him or themselves; but that the same may be determined by affidavit or affidavits, (or being made by any of the people called Quakers, by affirmation or affirmations), duly taken before any commissioner to be appointed as aforesaid (*n*), (or before the Prothonotary of the said Court, for the time being, or his officiating deputy *ex officio*, as officers of the said Court, and without any commission for that purpose), touching the value of the respective estates, and other necessary qualifications of such cognizor or cognizors."

Affidavit of justification.

It is the practice of this Court for bail to justify by affidavit, and not *viva voce*, and "no bail-piece shall be received and filed unless the usual affidavit of justification be annexed thereto, except for the purpose of surrendering a Defendant in discharge of bail; and in that case, the Plaintiff shall be at liberty to treat such bail as a nullity, until such surrender is actually made, and due notice thereof given" (*o*). The affidavit of justification must state that each of the bail is a housekeeper or freeholder, des-

(*k*) Evans' Pr. C. P. L. 37.

(*l*) See ante pa. 35

(*m*) 34 Geo. 3., c. 46. s. 1.

(*n*) That is a Commissioner for taking Bail.

(*o*) Reg. Gen. Mar. Ass. 57 Geo. 3.

cribing his residence; and that he is *worth* the amount required by the practice of the Court over and above what will pay his just debts; and over and above every other sum for which he is then bail (*p*).

By rule (9) of March Assizes, 5, W. IV., it is ordered, "that if a notice of special bail shall be accompanied by an affidavit of each of the bail, according to the form thereto subjoined (*q*); and if the Plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification: and if such bail are rejected, the Defendant shall pay the costs of opposition, unless this Court, or a Judge thereof, shall otherwise order." It is not absolutely necessary to adopt the *form* of affidavit thus prescribed; for if sufficient be sworn to, according to the former practice, it is enough (*r*): but if the copy of the affidavit served according to such rule, do not purport to be a copy; or if the bail do not state the names of the parties, and the debts in the actions in which they are already bail; or the occupants and numbers of the houses stated to be, by the bail, in their possession; though these and the like omissions are not grounds for rejecting the bail, yet they are, for disallowing the costs of justification (*s*): and the Plaintiff will be allowed costs of opposition, if the bail justify in respect of other property than that stated in the affidavit, if the latter be insufficient (*t*). As to when such costs should be applied for, and how obtained, see post pa. 98.

Affidavit of justification, in pursuance of Rule (9) of Mar. Ass. 5 W. 4.

As soon as bail is filed notice thereof should be given to the opposite party: and until such notice be given, the Plaintiff may proceed, as if no bail had been filed (*u*).

Notice of bail.

(*p*) Reg. Gen. (10) Mar. Ass. 2 W. 4. see form of affidavit ante pa. 91.

(*q*) See form of affidavit ante pa. 89-90.

(*r*) Per Littledale J. Anon. 1 Dowl. P. C. 115. See also Perry's bail, *Id.* 606; but see Okill's bail, 2 *Id.* 19, in which case Gurney B. said that the *form* of the affidavit must be adhered to: the question, however, in that case, was one of *substance*, and therefore this *dictum* must be taken with some qualification.

(*s*) De Bode's bail, 1 Dowl. P. C. 368. West v. Williams, 3 B. and Adol. 345. Popjoy's bail, 3 Dowl. P. C. 170.

(*t*) Jackson's bail, 1 Dowl. P. C. 172. Hemming v. Blake, *Id.* 179.

(*u*) It seems that notice of Bail which is merely filed for the purpose of tender, is not necessary, Wilson v. Griffin, 2 Cr. & J. 683; but see Short Assignee v. Doyle, 4 Dowl. P. C. 202.

A form of the Notice of Bail is given below (v) ; and it is provided (w), that "Every notice of bail shall set forth the names and additions of such bail ; and in case the residence of such bail, shall be in any of the several towns of *Lancaster, Liverpool, Manchester, Salford, Preston, Blackburn, Bolton, Wigan, Warrington, Rochdale, Chorley, Prescott, Ormskirk, Bury, and Oldham*, then such notice shall also specify the *Street*, or other certain place of residence of such bail, within any of the said towns respectively, and also the *number of the house*, in places where the houses are, or shall be, marked with numbers."

Affidavit of justification to accompany notice

When bail is filed pursuant to rule (9) of March assizes, 5, W. IV., a copy of the affidavit of justification must accompany the notice, and must purport on the face of it to be a copy (x).

Notice of perfecting.

If no exception be made to the bail within *eight days* (exclusive) *after service of notice thereof*, they will become perfected (y), that is established ; but if it be desirable to have the bail perfected, before they would become so by lapse of time, the Defendant, or his bail, may in all cases, perfect the same, on giving *four days* (exclusive) notice thereof, to the Plaintiff's attorney, or agent ; which notice must set forth the names and additions of the bail as before mentioned (y), and state the time and place of perfecting,

(v) *Notice of Bail.*

In the Common Pleas at Lancaster.

Between A. B.Plaintiff,

and

C. DDefendant.

Take Notice that Special Bail with the usual affidavit of justification annexed, [or if the Affidavit be according to Rule (9) of Mar. Ass. 5 W 4, then instead of the words in italics, say "the affidavit of justification a copy whereof is hereunto annexed"] is filed in this cause. The sureties are [here state the names and description of the bail with their places of residence, mentioning the street, and number (if any) of the house], [If the defendant intend to perfect the bail, here add, "and take notice that

(w) Reg. Gen. Mar. Ass. 57 Geo. 3.

(x) West v. Williams, & De Bode's bail, *supra* (note, s.).

(y) Reg. Gen. Mar. Ass. 57 Geo. 3.

which is usually at ten o'clock in the forenoon, at the Prothonotary's office, Preston. It is not the practice, however, to give notice to perfect, (though the bail be filed after the eight days from the arrest), except in the following cases, viz:—when, at the time of filing bail, the Sheriff has been ruled to bring in the body, in which case the Defendant should, together with the notice of bail, also give *two days'* (both exclusive) notice of perfecting the same (c): also, when bail is filed, after an attachment against the Sheriff, or proceedings taken on the bail-bond, a *four days'* (exclusive) notice of perfecting, should be given (d): and a like notice should be given when bail is filed, for the purpose of procuring a Defendant's discharge from custody (e); or when new bail is added or put in, after exception (f); or when the Defendant intends to apply for money which has been paid into Court under the statute 43, Geo. III., c. 46, or 7 and 8, Geo. IV., c. 71. A four days' notice to perfect given on the *Wednesday*, has been held to be good for the *Monday* following, though Sunday was the last day (g).

When notice to perfect is necessary.

The party intending to perfect bail, must attend at the Prothonotary's office, at the time mentioned in the notice; and if there be no opposition, the Prothonotary will, on an affidavit of service of such notice, allow the bail. It is not the practice to mark on the bail-piece, the allowance of bail, when they become perfected by time: but after opposition, or notice to perfect, it is usual to mark the bail allowed, or disallowed, as the case may be. No rule of allowance is necessary.

Mode of perfecting.

"All exceptions to bail shall be made within eight days (exclusive) next after notice of such bail served upon the

Exception when and how made.

the same will be perfected at the Prothonotary's office in Preston, on the day of instant, at ten o'clock in the forenoon"]

Dated the day of 18

Your's &c.

Bail acknowledged in £ severally.
To J. K., Plaintiff's attorney, [and]
L. M., his agent.]

E. F. Defendant's attorney,
[by G. H., his agent].

- (c) See proceedings against the Sheriff, post B. 2, ch. 4.
- (d) See proceedings on bail Bond. post B 2 ch. 5.
- (e) See proceedings against Prisoners, post B. 4 ch. 4.
- (f) Reg. Gen. Mar. Ass. 1783.
- (g) So held by the late dep. Prothonotary Cross, in *Ogilby v. Ilbery*, bail filed as of Sep. Ass. 5 Geo. 4; but see *North v. Evans*, 2 H. B. 35.

"Plaintiff's attorney, or agent" (*h*); and the mode of excepting is by taking out a rule, calling upon the Defendant to perfect his bail; which rule is granted by the Prothonotary who (as will be presently seen), generally requires an affidavit in support of the objection. "The rule for perfecting bail after exception, shall be a *four days rule* (exclusive), "and shall specify the time and place, when and where "the bail is to be perfected (*h*) :'" and such rule answers the purpose of the *notice* of exception, which is required in the courts at Westminster. No entry of exception is necessary in this Court.

Waiver of exception.

There are certain acts of a Plaintiff, which are deemed a waiver of exception—such as declaring absolutely, before justification; or demanding a plea, after a declaration *de bene esse*, and before justification (*i*). It was formerly held, that where bail to the Sheriff became bail to the action, the Plaintiff could not except to them after he had taken an assignment of the bail-bond; for by such assignment, it was considered that he deemed the bail to be sufficient: but now, "when bail to the Sheriff become bail to the action, the Plaintiff may except to them (*k*), though he has taken "an assignment of the bail-bond" (*l*).

Grounds of exception.

The same grounds of opposition as are available in the courts at Westminster, are equally so, in this Court—such, for instance, as some informality in the bail-piece, affidavits, or notices; that the bail are not housekeepers or freeholders, or worth the required amount; or that they are privileged, hired, or indemnified; or attorneys, attorneys' clerks, sheriff's officers, or foreigners; or that they are ignorant of the Defendant; or, have been outlawed, perjured, or rejected as bail before.

Affidavit of exception.

When the ground of opposition is not apparent on the bail piece, affidavits or notices, a rule to perfect will not be granted, without an affidavit of the grounds of objection; nor

(*h*) Reg. Gen. Mar. Ass. 57 Geo. 3, and as to the time and place of perfecting, see ante pa. 94-5.

(*i*) Tidd's pr. (9th Ed.) 255. Arch. (by Chitty), 185. 191.

(*k*) That is on sufficient grounds.

(*l*) Reg. Gen. (7) Mar. Ass. 2 W. 4.

will the rule be granted, unless the Prothonotary thinks the affidavit of exception sufficient to warrant it: and as the bail must swear that they are worth the amount of their recognizance, over and above their debts, and every other sum for which they are bail, it requires a strong affidavit to disprove their sufficiency. Such affidavit must disclose, with certainty and precision the particular objections, intended to be relied on; and it is not enough merely to suggest matters of report and general opinion, or hearsay, without alleging any particular fact, from which a distinct inference of incompetency can be collected (*m*).

The affidavits of exception are filed with the Prothonotary, from whom copies may be had, by the opposite party, who is at liberty to file affidavits in answer. If there be no attendance to perfect, at the time mentioned in the rule for that purpose, the Prothonotary, upon an affidavit of the service of such rule, will mark the bail as disallowed. In case of attendance, the Prothonotary decides as to the sufficiency or insufficiency of the bail, on reading the affidavits on both sides: there is no *personal* examination of the bail; nor are they supported or opposed by counsel. An appeal lies from the Prothonotary's decision, to the Judges of the Court; but no instance is known in which such an appeal has been made. The Prothonotary exercises his discretion, as to allowing further time to justify; and he may require further affidavits on either side, if he thinks necessary: but where a rule of exception has been granted, on an affidavit stating a particular ground of objection, another affidavit disclosing other and different grounds, is inadmissible.

Mode of perfecting after exception.

When bail are rejected on account of the insufficiency of one or both, the bail-piece becomes a nullity (*n*); but "bail, though rejected, shall be allowed to render the principal, without entering into a fresh recognizance (*o*)."

When bail is filed pursuant to the 9th rule of March Assizes, 5, W. IV., the costs of justification, or of oppo-

(*m*) See Tidd's pr. [9th Ed.] 274. 1 Chitt. rep. 676.

(*n*) *Lewis v. Gadderer*, 5 Bar. & Al. 704.

(*o*) Reg. Gen. [11] Mar. Ass. 2 W. 4.

Costs of justifying or opposing bail, when filed pursuant to Rule [9] of Mar. Ass. 5 W. 4.

sition, are, as we have seen, to be paid to the successful party, unless otherwise ordered; and if no order be made, they will form costs in the cause. The Plaintiff is entitled to the costs of opposition where the property described in the affidavit is insufficient; but the bail is possessed of other and sufficient property. (p). But costs of opposition on technical grounds merely, will not, it seems, be allowed (q). The Defendant is, entitled to the costs of justification, where, after exception, the Plaintiff does not appear to oppose (r): but not where there is a defect in the notice of bail, and further time is given to make inquiry (s).

It has been held that the costs of a successful opposition are to be allowed of course, unless some very strong grounds be shewn to the contrary (t); and in the Courts at Westminster the application for costs of justifying, must be made at the time of justification (u). In this Court the practice is not settled, as to when and in what manner, costs are to be applied for under the above Rule: but in several instances, the Prothonotary has taxed the costs, without a previous order of the Judge, and granted his allocatur of the amount; and the proper course would seem to be to proceed by attachment, for nonpayment.

Filing new bail. When it is intended to file new bail after exception, no notice *previous* to filing the same is necessary; but notice of filing, and four days (exclusive) notice of perfecting must be given (v); and, if such new bail be allowed or rejected, the bail-piece is marked accordingly. There is no rule of this Court, requiring a Defendant to pay the costs of a former successful opposition, before he be permitted to perfect fresh bail.

Discharge of bail.

There are no rules peculiar to this Court, relative to the causes which operate in discharge of bail. It may therefore be observed generally, that they are discharged by the

- (p) Jackson's bail, 1 Dow. P. C. 172. Hemming v. Blake, Id. 179.
- (q) Hanwell's bail, 3 Id. 425.
- (r) Johnson's bail, 1 Dow. P. C. 514.
- (s) Anon. Id. 126.
- (t) Evans' bail, Id. 384.
- (u) Fream v. Best, 2 Id. 590.
- (v) Reg. Gen. Mar. Ass. 1793.

death, bankruptcy, insolvency, or render of the principal; or by giving him time without their consent; by variance between the writ and declaration; or, in short, by any of the other causes, which have been held by the Courts at Westminster to operate in their discharge (*w*). A Defendant may either surrender himself voluntarily, or be surrendered compulsorily in discharge of his bail, at any time before they are fixed. It is not the practice of this Court to enter an *exoneretur* on the bail-piece after surrender and notice thereof, the bail being considered as exonerated without such entry (*x*).

(*w*) See Tidd's pr. [9th Ed.] pa. 281, & seq. Arch. (by Chitty). pa. 486 & seq.

(*x*) See further as to rendering a defendant in discharge of his bail, post B. 5, ch. 14.



BOOK 2. CHAP. IV.

OF PROCEEDINGS AGAINST THE SHERIFF IN DEFAULT OF BAIL.

Proceedings
against the Sher-
riff, when to be
taken.

If special bail be not filed within eight days after the execution of the writ of *Capias* (inclusive of the day of execution), the Plaintiff may proceed either against the Sheriff, or on the bail-bond (*a*), provided his right to do so be not taken away, by any of those circumstances, which preclude a Plaintiff from so proceeding, by the practice of the Courts at Westminster (*b*).

Rule to return
Writ.

The first step in proceeding against the Sheriff, is, to rule him to return the writ, for although the *Capias* (*c*) directs him to return the same, immediately after its execution, yet, it is not usual for him to make a return, unless called upon to do so. He should be ruled without unreasonable delay (*d*); and he is not obliged to make a return, unless ruled within *six* lunar months after the expiration of his office, the day on which he quits office being inclusive (*e*). It is not necessary, by the practice of this Court, to wait until the time for putting in special bail is expired, in order to obtain a rule to return the writ. Before the statute 4 and 5, W. IV., c. 62, such rule might be had on the return-day of the writ, though the Defendant had eight days afterwards to file special bail; and it would seem, that since that statute, the execution of the writ is for the purpose of the proceeding under consideration, deemed the return. (*f*) If special bail has been filed, but not perfected, a rule to per-

(*a*) See ante pa. 88.

(*b*) See Tidd's pr. (9th Ed.) 297, 305, & seq., & Arch. (by Chitty), 152.

(*c*) See form of *Capias* ante pa. 66.

(*d*) See post pa. 102

(*e*) See 20 Geo. 2, c. 37, s. 2; and Tidd's pr. (9th Ed.) 306-7.

(*f*) But see Arch. (by Chitty) pa. 153.

fect the same should be served, before the Sheriff is ruled to return the writ.

The rule to return the writ is granted by the Prothonotary; (g) and may be had on satisfying him by a letter from the Plaintiff's attorney, or otherwise, that the arrest has been made. It is a rule *absolute* in the first instance, and directs the late or present Sheriff, (as the case may be), to make his return, within *six* days after service thereof, upon him, or his undersheriff. It is usually served upon the undersheriff, by delivering a copy thereof, at his office, to his clerk who manages the business (h); and as an attachment lies for disobedience of such rule, the original rule should be shewn, at the time of service (i). Service of Rule to return Writ.

The Sheriff, when called upon, by rule of this Court, to return any writ, may obtain from the Prothonotary, a rule to *shew cause*, why the time for making the return, should not be enlarged; which last-mentioned rule, upon being duly served, will operate as a stay of proceedings against the Sheriff, from the time of such service, until the Court or a Judge otherwise order (j). Further time for making return.

If the Sheriff shall not obtain such further time, nor return the writ before or on the sixth day after service of the rule to return it, (the day of service being exclusive), the Plaintiff, on an affidavit of service and default, may obtain a Judge's order or a rule nisi from the Prothonotary, for an attachment (k). Attachment for not returning the Writ.

The Sheriff, however, generally returns the writ, *Cepi Corpus, et paratum habeo*, which return is filed with the Prothonotary, who marks on the writ the day of receiving it. Sheriff's return

When such return is made, if special bail be not filed, or if filed and excepted to, they do not justify, in due time, as after mentioned, the Plaintiff has still the option Rule to bring in the body.

- (g) This power was given by Reg. Gen. Mar. Ass. 52 Geo. 3, and confirmed by Reg. Gen. (1) Mar. Ass. 5 W. 4.
- (h) If the person be not the undersheriff, but acts as such, the rule served upon him will suffice; see 1 Sell. Pr. 195.
- (i) Reg. Gen. (26) Mar. Ass. 2 W. 4.
- (j) Reg. Gen. Mar. Ass. 57 G. 3.
- (k) See form of Attachment, post pa. 104.

- to proceed either on the bail-bond, or further against the Sheriff by ruling him to bring in the body (*k*): but if on the writ being so returned, special bail be filed, but not perfected, the Sheriff should not be ruled to bring in the body, unless the Plaintiff shall have first served a rule to perfect the bail; nor ought the Sheriff to be so ruled where the Defendant, after having given a bail-bond, has rendered himself to the Sheriff within eight days after the arrest, and the Sheriff has returned, that he has arrested the Defendant, and has him in prison (*l*).

At what time
the rule to bring
in the body may
be obtained.

Where there is nothing to prevent the rule to bring in the body from being taken out, it may be had from the Prothonotary, without any affidavit, immediately after the Sheriff has returned *Cepi Corpus, et paratum habeo*, provided the time for putting in bail be then expired, but not otherwise (*m*); and it ought to be taken out without unnecessary delay, or the Court will set aside an attachment for disobeying it (*n*).

No time has been precisely fixed for taking out this rule: but in one case, a delay from the 19th November to the 9th March, was held to discharge the Sheriff (*o*); in another, 80 days was considered too long a time, for a party to be quiescent (*p*); and, in a recent case, where a Plaintiff had delayed his proceedings for a term, the Sheriff was discharged (*q*).

The rule orders the Sheriff to bring into Court the body of the Defendant, within *six* days next after service thereof, upon him or his undersheriff; and it should be served in the same manner as the rule to return the writ.

(*k*) *Pople & an. v. Wiatt*, 15 East., 215.

(*l*) *Turner, v. Brown*. 2 Dowl. P. C. 547.

(*m*) *Rolfe, v. Steele*. 2 H. Bl. 276. *Rex, v. The Sheriff of Middlesex in Potter v. Marsden*, 8 East. 525. *Rex, v. The Sheriff of Middlesex*, in *Pouches, v. Lieven*. 4 Maule and S. 427.

(*n*) *Rex, v. The Sheriff of Surry*. 7 T. R. 452. *Rex, v. The Sheriff of London*, in *Peacock, v. Leigh*. 1 Taunt. 111.

(*o*) *Rex, v. Perring & an.* 3 Bos. & P. 151.

(*p*) *Rex, v. The Sheriff of Surry*, in *Morris, v. Duffield*. 9 East. 467.

(*q*) *Rex, v. The Sheriff of Middlesex*, in *Davis, v. Allen*. 1 Dowl. P. C. 53.

The object of ruling the Sheriff, is, to compel the putting in and perfecting of special bail; and when bail is filed after service of a rule to bring in the body, the bail must be perfected without exception: and "in all cases of "proceedings against the Sheriff to compel the bringing "into Court the body of any Defendant, such Defendant, "his Attorney, or Agent, or the Sheriff, or Undersheriff, "after filing bail, with the usual affidavit of justification "annexed, shall *two* days (both exclusive) before such bail "shall be perfected, give notice in writing, to the Plaintiff's attorney, or agent, of the names and additions of "such bail, and of the time and place when it is intended to "perfect the same, before the Prothonotary of this Court, "or his deputy: and no such bail shall be perfected, without an affidavit made, and filed in the Prothonotary's "office, of the service of such notice: and in case the Prothonotary, or his deputy, shall, upon hearing the matter, "allow such bail, the same shall be considered as perfected, for the purpose of discharging the Sheriff, unless the "Court, or one of the Judges thereof, otherwise order (r)."

Perfecting Bail to discharge the Sheriff.

If special bail be not perfected, or the Defendant surrendered, (which is deemed equivalent to perfecting (s)), within the time limited by the rule to bring in the body—and which includes the whole of the day whereon such rule expires—the Sheriff is liable to an attachment; and it is no excuse for disobeying the rule that the proceedings have been stayed by an injunction obtained by the defendant (t); nor is the contempt purged by the death (u), or render of the defendant, after the time for bringing in the body, but before the attachment is obtained (r).

Attachment for not bringing in the body

When obtained.

On an affidavit of the service of the rule to bring in the body, and that no bail has been filed, or that bail has been filed but not perfected, a Judge's order for an Attachment

How obtained.

(r) Reg. Gen. Mar. Ass. 53 G. 3.

(s) Harford & ors., v. Harris. 4 Taunt. 669. Rex, v. The Sheriff of Middlesex, in Henderson, v. Van Wrede, 2 M. & Sel. 562. Chadwick, v. Battye, 3 Id. 283. Hodges, v. Hopkins, 1 Dowl. P. C. 431.

(t) Rex, v. The Sheriff of Middlesex, 1 Dowl. P. C. 454.

(u) Rex, v. The Sheriff of Middlesex, in Robins v. Hall, 3 T. R. 133.

(v) Rex, v. The Sheriff of Middlesex, in Watts, v. Hamilton, 2 Dowl. P. C. 432. Rex, v. The Sheriff of Middlesex, in Ridgway, v. Porter, 3 Id. 186., overruling Morley, v. Cole, 1 Price 103. And see Rex, v. The Sheriff of Middlesex, in Henderson, v. Van Wrede, *supra*.

may be obtained; or the Prothonotary will grant a rule to *shew cause* why an attachment should not issue (*w*). The attachment, like the rule to bring in the body, should be applied for without unnecessary delay (*x*).

Whence issued. The order for the attachment sometimes directs it to be issued by the Clerk of the Crown, (it being in the nature of a criminal proceeding); but when the order contains no such direction, the attachment (see form below (*y*), is made out by the party, signed by the Prothonotary, and sealed on a docket obtained from the Cursitor: it is tested on the day of issuing, and may be made returnable either at the assizes, or on a monthly return. It is directed to the Coroners, when it is against the present Sheriff; and to the present Sheriff, when it is against his predecessor. When directed to the Coroners, it is left with one of them (usually the one who resides at Preston); and an account of the debt together with a bill of costs, (as well of the cause, as of the proceedings against the Sheriff, and including the coroner's fee), is left with the Coroner. The amount of debt and costs is generally paid by the undersheriff to the coroner, and by him to the Plaintiff's attorney, or agent, on the return of the attachment. If, however, the coroner do not pay over the money, he may be ruled to return the attachment; and may himself be attached, for disobedience of such rule. An attachment against the coroners is directed to Elisors, named by the Prothonotary.

Proceedings under it.

Sheriff's liability. The Sheriff is liable for the whole debt (and not merely

(*w*) Reg. Gen. Mar. Ass. 57 G. 3

(*x*) See ante pa. 102.

Form of Attachment.

(*y*) William the Fourth, &c., to the Coroners of our County of Lancaster, greeting: We command you, that you attach A. B., Esquire, Sheriff of our said County, so that you may have him before our Justices at Lancaster, on [see *supra*] to answer us of and concerning those things which on our part shall at that time be objected against him: And that you have then there this Writ. Witness [the Chief Justice of the Court] at Lancaster, the day of [the day of issuing] in the year of our Reign.

E. F. Attorney Clarendon.

[Indorse on the Writ as follows:—]

A. B. v. C. D.

By Rule of Court of the day of 1836. [For not returning the writ or] for not bringing into Court the body of the defendant.

for the sum sworn to,) and costs (z), to the extent at least of the penalty in the bail-bond (a); as well as the costs of the attachment.

The proceedings on the attachment will be stayed at the instance of the Sheriff or his officer, or of the Defendant or his bail, upon putting in and perfecting special bail, and payment of costs: and sometimes, (as will be presently shewn), on the terms of the attachment standing as security. On filing bail for the purpose of staying the proceedings, there must be given, with the notice thereof, a *four days'* (exclusive) notice to perfect the bail (b); and it is provided by rule of Court, that "in case bail above shall be put in, "with such notice given to perfect the same, after an assignment of the bail-bond, or an attachment against the Sheriff, the proceedings upon the bail-bond, (or in case there "has been a bail-bond), against the Sheriff, shall be suspended from the time of giving notice of the bail "above being put in, until the time for perfecting such bail, "according to such notice, shall have expired: and in case "such bail above shall be perfected within such time, the "proceedings upon the bail-bond, or against the Sheriff, "shall be further suspended for the space of one week." (b) When the Sheriff has taken one surety only to the bail-bond, the Court will not set aside the attachment against him, even on payment of costs, on his own application (c); but if made at the instance of the bail, such relief will be granted (d). The Prothonotary is empowered to grant a rule to shew cause, why the proceedings upon the Attachment should not be stayed (b).

In staying proceedings after a *regular* attachment against the Sheriff, or proceedings taken on the bail-bond, the Court of King's Bench requires (e) an affidavit of merits, if the application be made by the original defendant; or if made on the part of the Sheriff, Bail, or Officer, an affidavit

(z) *Heppel, v. King*, 7 T. R. 370. *Rex, v. The Sheriff of London*, 9 East. 316. *Fowlds, v. Mackintosh*, 1 H. B. 233.

(a) *Rex, v. The Sheriff of Middlesex*, 3 East. 604.

(b) *Reg. Gen. Mar. Ass.* 57 Geo. 3.

(c) *Rex, v. The Sheriff of London*, in *Lazarus, v. Tanner and an.* 2 Bing. 227. 9 Moore, 422, S. C.

(d) *Rex, v. The Sheriff of Middlesex.* 2 Dowl. P. C. 140.

(e) *R. M. T.* 59 Geo. 3. See 2 B. & Al. 240. *Tidd's pr.* (9th Ed.) 316. *Arch.* (by Chitty), 170.

that the application is made at their own expence, for their indemnity, and without collusion with the original Defendant. And though there is not a similar rule in this Court, nor has it been the practice to require such affidavit, yet it seems proper to make it (*f*).

When attachment to stand as a security.

Where a trial has not been lost, the Court in staying proceedings will not in general order the attachment to stand as a security: but, by a late rule (*g*) it is ordered, that "upon staying proceedings either upon an Attachment against the Sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail (*h*), the attachment, or bail-bond, shall stand as a security, if the Plaintiff shall have declared *de bene esse*, and shall have been prevented for want of special bail being perfected in due time, from entering (*i*) his cause for trial, at the assizes next after the return (*j*) of the writ." Under this rule it has been held that the Plaintiff *must* declare *de bene esse* to entitle himself to such security (*k*); and should make it appear, by affidavit, (shewing the dates of the different proceedings), that a trial has been lost (*l*).

In what cases the Sheriff will be relieved, and as to his remedy over when he is fixed, and setting aside the proceedings against him when *irregular*, see Tidd's prac. (9th edit.) 316-317. Arch. (by Chitty), 165-172.

(*f*) In a late Case in the Exchequer, that Court, having no similar Rule, held that the affidavit thereby required, was not necessary. (*Rourke, v. Bourne*, 2 Dowl. P. C. 250, & 2 C. & M. 338, S. C. nom. *Bourne, v. Walker*.) Such Court, however, previously held the contrary: see *Dowson, v. Cull*, 2 Cr. & J. 671; and has since adopted the Rule. *Call, v. Thelwall*, 3 Dowl. P. C. 443. And although there is no such Rule in C. P. W., yet that Court, it seems, acts upon it. *Rex, v. The Sheriff of London*, in *Wilson, v. Goldstein & an.*, 4 Bing. 427.

(*g*) Reg. Gen. (50) Mar. Ass. 2 W. 4, extended to proceedings under the Stat. 4 & 5 W. 4, c. 62, by Reg. Gen. (1) Mar. Ass. 5 W. 4.

(*h*) Rendering the defendant, is equivalent to perfecting Bail. see *Hodge, v. Hopkins*. 1 Dowl. P. C. 431. *Whitehead, v. Phillips*, 2 B. & Ald. 585. *Rex v. the Sheriff of Essex*. 2 Dowl. P. C. 648.

(*i*). See *Rex v. The Sheriff of Middlesex*, in *Broadwood, v. Ogle*, 4 Dowl. P. C. 142.

(*j*) Now "execution"

(*k*) *Rex v. The Sheriff of Middlesex*, 1 Dowl. P. C. 454. *Baisley v. Newbold*, 4 Id. 177. *Goaling v. Dukes*, Id. 178. *Balmort v. Morris*, 1 Cr. & M. 661.

(*l*) *Rex v. The Sheriff of Surry*, in *Stone v. Wettenhall*. 5. Taunt. 606. *Phillips v. Whitehead*, 1 Chitt. Rep. 270. 271, note. *Rex v. The Sheriff of Middlesex*, in *Finlay v. Rallett*, 3 Dowl. P. C. 194.

BOOK 2. CHAP. V

OF PROCEEDINGS ON THE BAIL-BOND. (a)

Instead of proceeding against the Sheriff, in default of special bail, as mentioned in the last chapter, the Plaintiff has the option of proceeding on the bail-bond; and the latter course is usually followed, when the bail to the Sheriff is substantial. Where the bail-bond may be put in suit.

The provision of the statute 4, Anne, c. 16, as to assigning bail-bonds, is said to be confined to proceedings in the Courts at Westminster (b): but the 24th section of that act, seems to extend such provision to the Courts of the Counties palatine, and Wales. And the statute 22, Geo. II., c. 46, s. 35, after providing the monthly returns for the *Capia* and other mesne process of this Court, enacts that the Defendant shall appear and file special bail on the day of such return, or within eight days next after; and in case of neglect, the Sheriff, Undersheriff, or other Officer, shall, at the request and costs of the Plaintiff, his attorney, or agent, assign to the Plaintiff, the bail-bond taken for the Defendant's appearance upon the arrest by indorsement and attestation under his hand, in the presence of two or more credible witnesses: and the Plaintiff, after such assignment may bring an action upon such bond, in his own name; and this Court may, by rule or rules thereof, give such relief to the Plaintiffs and Defendants, in the original action, and to the bail, so sued upon the bail-bond, as is agreeable to justice and reason.

The time for filing special bail having been altered by the statute 4 and 5, W. IV., c. 62, a corresponding alter-

(a) As to the form of the Bond, in what cases taken, for what amount, how taken, and when it must be executed, see Arch. Pr. (by Chitty) 142.

(b) Evans' Pr. C. P. L. 32.

ation has necessarily been made in the condition of the bail-bond; and now, according to such condition, the bond may be put in suit, if special bail be not put in within eight days after *execution* of the *Capias*, *inclusive* of the day of such execution (c).

When not.

The Plaintiff, however, is not at liberty to proceed on the bail-bond pending a rule to bring in the body (a); and the same causes which operate to prevent such proceeding being taken in the Courts at Westminster, avail in this Court (e).

Assignment of the Bond, how procured.

To procure an assignment of the bond, it should be got from the *officer* who made the arrest, and in whose possession it remains; and on taking it to the undersheriff, he will assign, and deliver it to the party. The assignment is attested by two witnesses, and is usually made by the managing clerk in the sheriff's office, who affixes the sheriff's name and seal of office (f). The assignment need not now be stamped.

Action on the Bond, when to be brought in this Court, and proceedings therein.

If the action on the bail-bond be brought by the sheriff's assignee, it must be commenced in this Court, otherwise the parties could not have the relief intended by the statute (g). Special circumstances, however, may justify bringing the action in another court; as for instance, where the Defendants, or any of them, reside out of the jurisdiction (h). When the action is brought by the Sheriff, it may be prosecuted in another Court (i). The proceedings on the bail-bond must be commenced by writ of Summons, as the Defendants cannot be arrested. The Summons is made out, issued, and served, as in other cases; but need not be indorsed with the amount of debt and

(c) See the form of the *Capias*, & the 3rd warning thereon. ante pa. 66. and see *Hillary v. Rowles*, 2 Dowl. P. C. 201 5 B. & Ad. 460. S. C. *Evans v. Mosely*, 2 Dowl. P. C. 364.

(d) Reg. Gen. (14) Mar. Ass. 2 W. 4.

(e) See Tidd's pr. (9th Ed.) 297 & seq. Arch. (by Chitty) 161. & seq.

(f) Doe dem. *James v. Brawn*, 5 B. & Ald. 243. *Middleton v. Sandford*, 4 Camp. 36.

(g) *Morris v. Rees*, 2 Bl. Rep. 638. 3 Wils. 348, S. C. and see ante pa. 107.

(h) *Chesterton v. Middlehurst*, 1 Burr. 642.

(i) *Newman & an. v. Faucitt*, 1 H. Bl. 631. This has lately been provided for by Rule in the Courts at Westminster.

costs (j). If the Plaintiff unnecessarily issue more writs than one, he will be allowed the costs of one action only, (k). The declaration must commence and be intituled as below (l); and the form of it, as used in the Courts at Westminster (m), may, with a little variation, be adopted in this Court. The subsequent proceedings are the same as in ordinary cases.

The bail are liable to the full amount of debt (and not merely to the sum sworn to,) and costs, if not exceeding the penalty of the bond (n); as also to the costs of the action against them. Sureties to what extent liable.

The proceedings on the bail bond, like those against the Sheriff, may be stayed when *regular* (o), either by the Defendant, or his bail below, upon perfecting special bail, and payment of costs; and on such other terms as are "agreeable to justice and reason" (p). Staying proceedings.

We have seen (q) that though there is no express rule of this Court, which renders it necessary on applying to stay such proceedings, for the Defendant to swear to merits, or his bail (if they apply), to swear that the application is made by them, at their own expence, for their indemnity, and without collusion with the original Defendant, yet it is advisable to make such affidavit.

(j) Rowland v. Dakeyne, 2 Dowl. P. C. 832. Smart v. Lovick, 3 Id. 34.

(k) See post pa. 111.

(l) Form prescribed by Reg. Gen. (24) of Mar. Ass. 5 W. 4., and Reg. Gen. (1) of Mar. Ass. 6 W. 4., see post pa. 117.

In the Common Pleas at Lancaster.

The day of in the year of our Lord
(Venus)* A. B. (the Plaintiff in this suit) Assignee of C. D., Esquire, Sheriff of the said County, according to the form of the statute in such case made and provided, by E. F., his attorney, complains of G. H., J. K., and L. M., (the Defendants in this suit) who have been summoned to answer the said A. B., as assignee as aforesaid, by virtue of a writ issued on the day of in the year of our Lord in an action of debt, &c.

* See the mode of stating the venue, post pa. 117.

(m) See form of declaration, Tidd's Pr. (1833) pa. 291; and Chitty's forms, to Arch. Pr. pa. 59.

(n) Stevenson v. Cameron, 8 T. R. 28. Mitchell & others v. Gibbons, 1 H. B. 76.

(o) As to setting aside the proceedings for *irregularity*, and for other causes, see Tidd's Pr. (9th Ed.) 300, & Arch. (by Chitty), 165 & seq.

(p) See ante pa. 107.

(q) See ante pa. 105-6.

Staying proceedings.

When special bail is filed after proceedings are taken on the bond, and it is not intended to render the Defendant, there should be given with the notice of bail, four days (exclusive) notice of perfecting the same (r); and when bail above is put in, with "such notice given to perfect the same, after an assignment of the bail-bond, or an attachment against the Sheriff, the proceedings upon the bail-bond, or (in case there has been a bail-bond) against the Sheriff, shall be suspended from the time of giving notice of the bail above being put in, until the time for perfecting such bail, according to such notice, shall have expired: and in case such bail above shall be perfected, within such time, the proceedings upon the bail-bond, or against the Sheriff, shall be further suspended for the space of one week" (r).

On filing Special Bail.

Upon special bail being *filed*, with the usual affidavit of justification annexed, the Prothonotary is authorized (s) to grant a rule to shew cause why the proceedings upon the assignment of the bail-bond, should not be stayed upon payment of costs; which rule will operate as a stay of the Plaintiff's proceedings, from the time of service, until otherwise ordered; and in case the rule should not be made absolute, the Defendant must undertake not to bring a writ of Error for delay; and the Plaintiff is to be in the same situation, with respect to any rules, notices, or pleadings, and may take such steps, as of the day on which such rule was obtained, unless otherwise ordered (s).

On perfecting Special Bail.

The practice, however, is, not to take out a rule nisi to stay proceedings, until special bail is *perfected*; in which case the rule is drawn up accordingly, and operates as a stay of proceedings from the service.

On surrendering the Defendant.

The proceedings may also be stayed on the Defendant's being surrendered; and it is provided by a late rule (t), that "the Prothonotary of this Court, or his deputy, have power to issue a rule nisi to stay proceedings, upon the assignment of a bail-bond, the Defendant having

(r) Reg. Gen. Mar. Ass. 57 Geo. 3.

(s) Reg. Gen. Mar. Ass. 52 Geo. 3.

(t) Reg. Gen. (17) Mar. Ass. 5 W. 4.

"filed special bail, and having been surrendered in discharge thereof, which rule, shall, upon being duly served, operate as a stay of the Plaintiff's proceedings, from the time of such service, until this Court, or one of the Judges thereof, shall otherwise order."

In ordering the rule nisi to stay proceedings to be made absolute, the Judge will impose such conditions as may seem just; and will sometimes require the Defendant to plead issuably, rejoin gratis, and take short notice of trial, and also perfect bail, when that is not already done. If, however, a trial has not been lost, the proceedings will, in general be stayed, after perfecting bail, upon payment of the costs incurred on the bail-bond: but, as we have seen (v), if the Plaintiff has declared *de bene esse*, and been prevented for want of special bail being perfected, (or the Defendant surrendered) in due time, from entering his cause for trial, at the assizes next after the return of the writ, the bail-bond will be ordered to stand as a security.

Staying proceedings on terms.

When Bail bond directed to stand as a security.

"In all cases where the bail-bond shall be directed to stand as a security, the Plaintiff shall be at liberty to sign judgment upon it; and, if the Plaintiff succeeds in the original action, he shall be allowed the costs of proceeding upon the bail-bond, as part of the costs of the cause; but without prejudice to his right to recover the same, if necessary, under the judgment upon the bail-bond (w)."

Signing Judgment on the Bond.

"Proceedings on the bail-bond may be stayed on payment of costs, in one action, unless sufficient reason be shewn for proceeding in more (x):" but it is too late after verdict, to apply to stay the proceedings, on payment of the costs of one action only (y).

Costs of one action only allowed.

The proceedings may be stayed, without putting in special bail, on the Defendant's undertaking, by rule, to pay the debt, and the costs of the original action, together with the costs of the action on the bond.

Staying proceedings on payment of debt and costs.

(v) Ante pa. 106 and see the cases there referred to.

(w) Reg. Gen. (17) Mar. Ass. 2 W. 4.

(x) Reg. Gen. (18) Mar. Ass. 2 W. 4, and see Key v. Hill, 2 B & Ald. 598.

(y) Johnson v. Macdonald, 2 Dowl. P. C. 44.

Entitling Rules
and Affidavits.

In staying the proceedings, it is the practice of this Court to entitle the rule and affidavits, in the original action, and not in the action on the bond; though, it seems, either mode will do (z). When the order to stay proceedings is obtained, a rule absolute is procured thereon, together with an appointment to tax; and when the costs are paid, after a rule to stay proceedings on special bail being perfected, the proceedings in the original action may go on; but the Plaintiff cannot proceed in the original action, so long as he retains his right to proceed on the bail-bond (a).

(z) *Leyles v. Chetwood*, 1 Dow. P. C. 321. 2 C. & J. 332, S. C.

(a) 1 Chitt. Rep. 394, [note].

BOOK 2. CHAP. VI.

OF THE DECLARATION.

The declaration in this Court is always *filed* with the Prothonotary, and not *delivered*, as is required, in some cases, by the practice of the superior Courts at Westminster (a). Filing.

A declaration is filed *absolutely* after an appearance is entered, or bail perfected; and *de bene esse*, that is *conditionally*, before bail is filed or perfected: but declaring *de bene esse* is now confined to bailable actions (b). The only difference in the mode of declaring absolutely and conditionally, is in the notice of declaration, the form of which is varied accordingly (c). Absolutely.
De bene esse.

It is questionable, whether the power to declare *by the bye* any longer exists (d). The right of thus declaring, in this Court, was always confined to the Plaintiff in the original action; and there has been no time prescribed by Rule of Court, for so declaring. By the bye.

In the absence of special bail or an appearance (as the case requires) a declaration cannot be filed until the expiration of the term. When the declaration may be filed.

(a) In declaring against a defendant who is in gaol for want of bail, a copy of the declaration must be delivered, see post B. 4, ch. 4; and in Ejectment, a copy of the declaration against the casual Ejector must be delivered: see post B. 4, ch. 1; but in both these cases, the *original* must be filed, as mentioned above.

(b) *Fish v. Palmer*, 2 Dowl. P. C. 460. Chitty's Gen. Prac. vol. 3, part 6, p. 438, and Atherton's Treat. 98.

(c) See form of Notice, post pa. 120.

(d) As the practice of declaring by the bye, in the Courts at Westminster, was derived from, and regulated by principles applicable only to *Terms*, and *Vacations*, it is said that the uniformity of process Act, which authorizes proceedings to be taken in *Vacation*, as well as in *Term* time, has virtually abolished the practice of declaring by the bye; See Supp. to Petersdorff pr. 20. Tidd's pr. [1833], pa. 120. Arch. [by Chitty], 220; but see Atherton's Treat. 106.

ration of eight days next after the execution of the process; but the Plaintiff may declare immediately after the Defendant has filed bail, or entered an appearance, though the eight days may not have elapsed (e).

Former practice
as to declaring
de bene esse.

The practice of declaring *de bene esse* has been virtually altered by the statute 4 and 5 W. 4, c. 62. According to the former practice, a Plaintiff might have so declared on the return day of the writ, provided the Defendant was arrested, or served with process, four days (exclusive) before such return; but if the Defendant was not so arrested or served, then the Plaintiff was precluded from declaring *de bene esse* until four days (exclusive) after the return (f); and the time limited for the Plaintiff to declare *de bene esse* was eight days, exclusive, after the return.

Present practice.

As there is now no return day named in the process for the commencement of personal actions, it is obvious that the former Rule of practice, as to declaring *de bene esse*, is inapplicable to the altered state of things; and as it has been held that a Plaintiff cannot, in the absence of the Defendant's appearance, declare until eight days after the service of a writ of *Summons*, he cannot, consequently, now declare *de bene esse* upon such writ (g). He may, however, still declare *de bene esse* after a writ of *Capias*; so far, at least, as such writ is used as bailable process; for, by a late Rule (h), it is ordered, that, "upon all writs of *Capias*, where the Defendant shall not be in actual custody, the Plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse*, in case special bail shall not have been perfected; and if there shall be several Defendants, and one or more of them shall have been served only, and not arrested, and the Defendant or Defendants so served shall not have entered a common appearance, the Plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them, in chief (i), and de

(e) *Morris v. Smith*, 4 Dowl. P. C. 198. 2 C. M. & R. 314, S. C. and see Athert. Tr. 92.

(f) Reg. Gen. Mar. Ass. 52 Geo. 3.

(g) *Fish. v. Palmer*, 2 Dowl. P. C. 460; and see *supra* (note b).

(h) Reg. Gen. [8] Mar. Ass. 5 W. 4.

(i) This means here *absolutely*.

"*bene esse* against the Defendant, or Defendants, who shall have been arrested, and shall not have perfected special bail."

The Plaintiff may declare *de bene esse* after the eight days from the arrest, and before special bail are perfected, whether bail have been put in or not (*k*); and if he declare at all, before the bail are perfected, he should declare *de bene esse*; for by declaring *absolutely*, before bail are filed, it is irregular, and will operate as a waiver of bail; and if he declare *absolutely* after bail filed, and before they are perfected, it will be a waiver of justification.

Advantage of
declaring *de
bene esse*.

Although it is optional with the Plaintiff, before bail are perfected, to declare *de bene esse* or not, yet it is advisable to do so, as it not only expedites his proceedings, but, as we have seen (*l*), whenever he shall have thus declared, and shall have been prevented, for want of bail being perfected, from proceeding to trial at the assizes next after the return of the writ, then, upon staying proceedings, either upon an attachment against the Sheriff, for not bringing in the body, or upon the bail bond, on perfecting bail, the attachment, or bail bond, shall stand as a security.

Thus we have seen, that the times when a Plaintiff may declare absolutely, or conditionally, are as follows:—*After a Summons*, he cannot declare conditionally at all, but may declare absolutely, either within eight days after service of such writ, if the Defendant has appeared; or after the eight days, if the Defendant has appeared, or the Plaintiff has entered an appearance according to the statute. *After a Capias*, the Plaintiff may declare either conditionally or absolutely, within eight days after the arrest, if the Defendant has filed special bail; or he may declare conditionally after the eight days, whether special bail be filed or not, provided bail be not perfected. The declaration should be filed conditionally if special bail are not put in, or perfected; and must be filed absolutely if they are perfected.

Summary.

(*k*) *Bailey v. Newbold*, 4 Dowl. P. C. 177. *Gosling v. Dukes*, Id. 178.

(*l*) *Ante* pa. 106 & 111.

Within what
time the plain-
tiff must declare

In all personal actions (except replevin) the Plaintiff *must* declare before the rule day, *after* the assizes, next ensuing the time of filing bail, or entering the appearance (*m*); otherwise the Defendant will be entitled to judgment of nonpros (*n*). The Plaintiff may, however, declare at any time before nonpros is actually signed, provided it be within a year after the return of the process; but he "shall be deemed out of Court, unless he declare within one year "after the process is returnable" (*o*): and this it seems is so, where the proceedings have been stayed, for a part of the period, by rule (*p*); or in consequence of the Plaintiff's not having served, or arrested some of the Defendants (*q*). The time for declaring against a prisoner, in order to prevent his discharge, is stated in another place (*r*).

Further time to
declare.

If the Plaintiff require further time to declare, he may, (except in actions of replevin (*s*), and against prisoners (*t*)) obtain from the Prothonotary, as of course, a rule absolute for that purpose; but he is only entitled to one such rule, by which, whenever issued, the time given cannot be extended beyond the rule day *preceding* the *second* assizes after the Defendant has filed bail or entered an appearance; and if still further time be required, an application must be made to the Court, or to one of the Judges, shewing special grounds, as, for instance, that one of several Defendants cannot be served with the process (*u*). It is not the practice of this Court to rule the Plaintiff to declare.

The declaration

Having seen when the declaration is to be filed, we will now notice the rules and practice of this Court, relative to the declaration itself.

(*m*) Reg. Gen. Aug. Ass. 38 Geo. 3.

(*n*) See post B. 5, ch. 7.

(*o*) Reg. Gen. (21) Mar. Ass. 2 W. 4. And it seems that the day of executing the process is, for this purpose, to be considered the return; see post B. 5, ch. 7.

(*p*) *Unite v. Humphrey & others*, 3 Dowl. P. C. 532.

(*q*) *Barnes v. Jackson & others*, Id. 404. 1 Bing. N. C. 545: S. C.

(*r*) See post B. 4, ch. 4.

(*s*) See post B. 4, ch. 2.

(*t*) See post B. 4, ch. 4.

(*u*) *Morton & an. v. Grey & an.*, 9 B. & C. 544; see also *Ames v. Ragg*, 2 Dowl. P. C. 35.

Formerly, all declarations in this Court were intituled as of the assizes next preceding the time of filing the same; but by rule (24) of Mar. Ass. 5 W. 4, it is ordered that "every declaration shall in future be entitled of the day of the month and year on which it is filed;" and by rule (1) of Mar. Ass. 6 W. IV., it is ordered that "the date of the issuing of the process, shall be stated at the commencement of every declaration thereafter to be filed, according to the form mentioned in the schedule thereto annexed, *mutatis mutandis*" (v). A mistake in the intituling, or date, or commencement of a declaration, is an irregularity, but not a ground of demurrer (w); and it is irregular to entitle it on the back (x).

The name of the county must, in all cases, be stated in the margin of the declaration, and be taken to be the venue intended by the Plaintiff; and no venue ought to be stated in the body of the declaration, or in any subsequent pleading; nevertheless, in cases where local description is

(v) *Intituling and commencement of declarations, as prescribed by the above rules.*

In the Common Pleas at Lancaster.

The day of in the year of our Lord
 Lancashire to wit, } *A. B.*, by *E. F.*, his attorney. [or in his own pro- Commencement
 [Division]. } per person or by *E. F.*, who is admitted by the of declaration
 Court here, to prosecute for the said *A. B.*, who is an infant within the after Summons.
 age of twenty-one years, as the next friend of the said *A. B.*, as the case
 may be] complains of *C. D.*, who has been summoned to answer the said
A. B., by virtue of a writ issued on the day of in the year of our
 Lord

(*Venue*) *A. B.*, by *E. F.*, his attorney, [or "in his own proper person," or as above] complains of *C. D.*, who has been arrested at the suit of the said *A. B.*, by virtue of a writ issued, &c., [as above].

(*Venue*) *A. B.*, by *E. F.*, his attorney [or "in his own proper person," or as above] complains of *C. D.*, being detained at the suit of the said *A. B.*, in the custody of the Sheriff of the said County, by virtue of a writ issued, &c., [as above].

(*Venue*) *A. B.*, by *E. F.*, his attorney, [or "in his own proper person," or as above], complains of *C. D.*, who has been arrested at the suit of the said *A. B.*, [or "being detained at the suit of the said *A. B.*," or as before] by virtue of a writ issued, &c., [as above], and of *G. H.* who has been served with a writ of *Capias*, issued, &c., [as above] to answer the said *A. B.*, &c.

The like after arrest when defendant is not in custody.

The like when defendant is in custody.

The like after arrest of one defendant, when another has been served only.

The only remaining form prescribed, is one for the commencement of a declaration on a Bail Bond, by the Assignee, against the defendant and his bail to the Sheriff, for which see ante pa. 109: and as to commencing a declaration in a second action, after a plea of non-joinder, see Reg. Gen. (20) Hil. T., 4 W. 4.

(w) *Marshall v. Thomas*, 3 M & Scott, 98. *Anderson & an. v. Thomas*, 9 Bing, 678. *Neal v. Richardson*, 2 Dowl P. C. 89.

(x) *Ripling v. Watts*, 4 Dowl. P. C. 290.

required, such description must be given (y). The improper introduction of a venue, is not a ground for setting the pleading aside (z), nor of demurrer; the proper course being to apply to a Judge to strike out the venue (a).

Division of the county to be stated in the margin.

Besides the ordinary venue, every declaration in any action in this Court, must have in the margin the words "Northern Division," or "Southern Division:" and issues arising in such actions, if tried at the assizes, will accordingly be tried at the assizes held at Lancaster and Liverpool respectively. And in all cases of civil actions in this Court, in which the venue is by law local, the issues therein will be tried at Lancaster, where the cause of action shall have arisen in the Northern Division; and at Liverpool, where the cause of action shall have arisen in the Southern Division, in like manner as if the two divisions were separate counties: and the declarations in such actions must have in the margin, in addition to the ordinary venue, the words "Northern Division," or "Southern Division," as the case may require; but no other alteration from the ordinary form shall be necessary. Where there are no words in the margin, specifying the division of the county, the cause will be tried at Lancaster, unless the Court, or a Judge thereof, otherwise order, by directing the proper words to be inserted in the margin, or otherwise, as he shall think fit; and he may also order the issue to be tried at the assizes held in the division in which the cause of action did not arise, if he think fit (b).

Forms of declarations.

Several provisions have lately been made for shortening the form of the declaration, and limiting the number of counts—thus, in actions upon *Bills of Exchange*, *Promissory Notes*, and the counts usually called the *Common Counts*, it is provided by a late rule (c), "that if any declaration in *Assumpsit*, being for any of the demands mentioned in "the schedule of forms, and directions, annexed to that

(y) Rule 8 of Hil. T. 4 W. 4. These pleading rules are, in practice, adopted in this Court, so far as they are applicable. See stat. 3 & 4 W. 4, c. 42, s. 1.

(z) *Townsend v. Gurney*, 3 Dowl. P. C. 168. 1 C. M. & R., 590, S. C.

(a) *Harper v. Chumney*, 2 Dowl. P. C. 680. 1 C. M. & R. 369, S. C. nom. *Farmer v. Champneys*. *Fisher v. Snow*, 3 Dowl. P. C. 27.

(b) The above regulations are contained in the order of the King for holding the assizes at Liverpool as well as Lancaster. See further on this subject, ante pa. 37-8.

(c) Reg. Gen. [13] Aug. Ass. 2 W. 4.

"order (d), or demands of a like nature, shall exceed in length, such of the said forms, set forth or directed in the said schedule, as may be applicable to the case; or if any declaration in *debt* for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the Plaintiff, if he succeeds in the cause; and such costs of the excess, as have been incurred by the Defendant, shall be taxed and allowed to the Defendant; and be deducted from the costs allowed to the Plaintiff: and further, that on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney, in respect of any such excess of length; and in case any costs shall be payable by the Plaintiff to the Defendant, on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill."

By another rule (e) it is ordered, "that no costs shall be allowed on taxation to a Plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the Defendant, shall be deducted from the Plaintiff's costs:" and again (f), "in all actions of debt on simple contract and *assumpsit*, after judgment by default, the Prothonotary of this Court, or his deputy, shall on the taxation of costs, allow only for such part of the declaration as he shall think necessary:" and further, "several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each (g):" If the Plaintiff insert in the declaration more counts than are necessary, a rule to shew cause why they should not be struck out, may be had from the Prothonotary (h); and, on the subject of costs, consequent on the introduction of unnecessary counts and pleas—see post B. 5, c. 22.

The declaration must correspond with the process, or the proceedings will be set aside for irregularity: thus, if

(d) These forms, as well as the forms of pleadings in general, being the same as those used in the Courts at Westminster, it is considered unnecessary to give them in this work.

(e) Reg. Gen. [32] Mar. Ass. 2 W. 4.

(f) Reg. Gen. [63] Mar. Ass. 2 W. 4.

(g) See Reg. Gen. of Hil. T. 4 W. 4; and see *Id.* as to what counts are allowed to be joined.

(h) Reg. Gen. [19] Mar. Ass. 5, W. 4.

the process is in *promises*, and the declaration in *covenant*, the latter will be set aside for irregularity, though the variance is not a ground of demurrer (*i*): so too, it is irregular to declare generally, upon process which is special; but where the process is general, and the declaration special, as by or against an executor, or assignee; the Court will not set aside the proceedings for irregularity, though the bail may get discharged on the ground of such variance (*j*). We have seen that after bailable process against two, a declaration against one only, is irregular (*k*): but, that after serviceable process, the Plaintiff may declare against one of several Defendants, for a separate cause of action, provided he abandon his proceedings against the others (*l*).

Amendment of Declaration.

The Plaintiff may obtain from the Prothonotary, a rule absolute, in the first instance, to amend his declaration in such manner as he may think proper, on payment of costs. This rule is granted of course, and may be had either before or after plea (*m*). As to the time for pleading after an amendment, see the next chapter.

Notice of declaration.

Notice of declaration (*n*) should be given, immediately after the declaration is filed, as the time for pleading is

(*i*) *Ward v. Tummon*, 1 Ad. & E. 619: see also *Thompson v. Dicas & an.*, 1 C. M. & R. 768. 2 Dowl. P. C. 93, S. C. *Edwards v. Dignam*, Id. 240. 2 Cr. & M. 340, S. C.

(*j*) *Manesty v. Stevens*, 1 Dowl. P. C. 711. *Knowles v. Johnson*, 2 Dowl. P. C. 653. but see *Ashworth v. Ryal*, 1 Barn. & Ad. 19.

(*k*) See ante pa. 69.

(*l*) See ante pa. 54.

(*m*) Reg. Gen. Mar, Ass. 52 Geo. 3.

(*n*) *Notice of Declaration.*

In the Common Pleas at Lancaster.

Between A. B.....Plaintiff,
and

C. D.....Defendant.

Take Notice, that a Declaration was this day filed with the deputy Prothonotary of the said Court, at his office in Preston, in the County of Lancaster, [if filed *de bene esse*, here add, "conditionally, until Special Bail be [put in and] perfected"] against you, [or, if the defendant has appeared by attorney, or filed Special Bail, say "against the said defendant"], at the suit of the above-named plaintiff, in an action on promises, [or "of debt, for £ ", or as the case may be,] to the plaintiff's damage of £ : and unless you [or "the defendant"] plead thereto within eight days after service hereof, judgment will be signed against you [or "him"] by default. Dated the day of in the year of our Lord
To C. D. the above-named defendant, } E. F. Plaintiff's attorney,
[or "to J. K. defendant's attorney, } [by G. H. his agent].
and L. M, his agent."

computed from the service of the notice, and not from the When to be
filing of the declaration; and the declaration is deemed given.
good, only from the time of the notice (o).

Every such notice must contain the christian and sur- Contents.
names of all the parties to the suit—the nature of the
action—and the time limited for the Defendant to plead (p):
it is usual to state the amount of the debt or damages as in
the declaration: and when the declaration is filed *de bene*
esse, that fact must be mentioned. The notice should be
dated, signed by the Plaintiff if he sues in person, or by
his attorney if he so sues, and directed to the defendant
himself, if he defends in person, or has not appeared or
filed bail; or to his attorney, if he has appeared or filed bail
by one. As the declaration must follow the process, so
must the notice correspond with the declaration, or the
proceedings will be set aside for irregularity (q).

The service of notice is regulated by rule (1), of August Service.
assizes, 2; W. IV., which directs, that "in all personal
"actions, the Plaintiff's attorney shall, on filing the decla- On whom.
"ration, in case the Defendant shall have filed special bail,
"or entered a common appearance, give notice of such de-
"claration, to the Defendant's attorney, or agent; and in
"case such declaration shall be filed *de bene esse* (r), or if
"an appearance shall be entered for such Defendant, ac-
"cording to the statute, shall give notice of such declaration
"to the Defendant (s), by delivering a notice of such
"declaration to the Defendant, or leaving the same at the
"last or most usual place of his abode:" * * * * "And
"in case the Defendant or Defendants shall be in gaol, at
"the time of filing declaration a copy thereof, together with
"such notice as aforesaid, shall be delivered to each De-
"fendant, or to the gaoler, or turnkey."

(o) *Weddle v. Brazier*, 1 Dowl. P. C. 639. 1 Cr. & M. 69, S. C.

(p) Reg. Gen. (1) Aug. Ass. 2 W. 4.

(q) *Cooke v. Johnson*, 1 Dowl. P. C. 247. 1 M. & Scott, 115, S. C.
Robins v. Richards, 1 Dowl. P. C. 378: and as to the time for taking ad-
vantage of such irregularity, see *Smith v. Clarke*, 2 Id. 218.

(r) This rule was made before the alteration in the practice of declaring
de bene esse, as stated ante pa. 114: and, therefore, so far as it requires the
notice of a declaration, filed *de bene esse*, to be served on the defendant,
is now inoperative in non-bailable actions, and also in those bailable
actions wherein bail is filed by attorney but not perfected.

(s) Where there are several defendants notice must be given to each.

How served.

Personal service on the Defendant is not necessary. If the notice be left at his residence, or last place of abode, it is sufficient; and, under special circumstances, a notice will be deemed sufficient, though left by mistake at the residence of the Defendant's father, if the probabilities are that it came to his knowledge, and he does not deny the fact (*t*): but "where the residence or last place of abode of a Defendant, is unknown to the Plaintiff and his attorney, notice of declaration may be stuck up in the Prothonotary's office; but not without previous leave of the Court, or one of the Judges thereof (*u*)."

The order to affix the notice in the Prothonotary's office, upon a proper affidavit (*v*), is absolute in the first instance (*w*); but to obtain such order, it must be shewn that more than one attempt was made, to find the Defendant (*x*).

Particulars of demand, when to be delivered with notice of declaration.

When a declaration contains counts in *Indebitatus Assumpsit*, or *debt on simple contract*, the Plaintiff must, with the notice thereof, deliver full particulars of his demand, under those counts, when such particulars can be comprised within *three folios*; but if they cannot be comprised within three folios, he must deliver such a statement of the nature and amount of his claim, as may be comprised within that number of folios (*y*). The consequence of a non-compliance with this rule, is stated in another place (*z*), where the subject of particulars is more fully considered.

The declaration is not allowed to be taken out of the Prothonotary's office after it is filed, except for the purpose of enrolling the pleadings for trial: It may, however, be seen at any time during office hours; and a copy thereof may be had from the Prothonotary.

(*t*) Rolfe v. Brown, 3 Dowl. P. C. 628.

(*u*) Reg. Gen. (24) Mar. Ass. 2 W. 4.

(*v*) See form of Affidavit appen. to Tidd's pr. (1833) pa. 295. Chitty's forms, 108.

(*w*) Bridger v. Austen, 1 Dowl. P. C. 272.

(*x*) Fry v. Rogers, 2 Id. 412. Heming v. Duke, Id. 637.

(*y*) Reg. Gen. (9) Aug. Ass. 2 W. 4.

(*z*) See post B. 5, ch. 3.

BOOK 2. CHAP. VII.

OF THE PLEA, REPLICATION, ETC.

We have seen that when a declaration is filed, notice thereof must be given, stating the time limited for the Defendant to plead; and that a rule to plead is not necessary.

By a late rule it is ordered, that the time allowed to the Defendant to plead, to every personal action, shall be *eight* days exclusive (a)—that is, after notice of declaration: but if the Plaintiff give a greater number of days than is required, the Defendant is entitled to such extended time (b). The above rule, however, does not apply to actions of replevin (c); nor, (as will presently be shewn), to pleas formerly called *puis darrein continuance*. Pleas in bar may be filed at any time before judgment is actually signed, though the time for pleading may have expired; but “all pleas in abatement and demurrers shall be filed before, or immediately upon, the expiration of the notice to plead; and if filed at any time afterwards, the Plaintiff may sign judgment as for want of plea” (d). Time for pleading.
In bar.
In abatement.

Pleas, of matters formerly pleadable *puis darrein continuance*, must now be accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea, unless the Court, or a Judge, shall otherwise order; and the allegation in the plea must be, that the matter arose after the last pleading, or the issuing of the jury process, as the case may be (e). In the nature of
puis darrein continuance.

When *oyer* is demanded, the defendant has the same time to plead after it is granted, as he had at the time of After oyer.

(a) Reg. Gen. [2] Aug. Ass. 2 W. 4.

(b) Solomonson & an. v. Parker & an. 2 Dowl P. C. 405.

(c) See post B. 4, ch. 2.

(d) Reg. Gen. [3] Aug. Ass. 2 W. 4.

(e) R. [2] H. T. 4 W. 4. See post pa. 125.

the demand and notice thereof; for instance, if he had eight days originally, and after four days had elapsed, he demanded *oyer*, he has four days to plead after delivery of *oyer* (*f*).

After amendment of declaration.

After amendment of "declarations and other pleadings by rule of Court, or Judge's order, (unless such rule or order shall otherwise direct), such time shall be allowed for pleading to or answering such amended declarations or other pleadings, either originally, or de novo, as follows; that is, in case the time originally allowed for such purposes respectively shall not be expired at the time of any such amendment made, then eight whole days in addition to such original time; but, in case such time shall be expired, then eight whole days from the time of the amendment made (g)." Where a defendant has liberty to plead de novo after amendment of the declaration, the Plaintiff cannot sign judgment as for want of plea, if the former plea applies to the amended declaration (h).

Further time to plead in ordinary cases.

If the Defendant be not prepared with his plea within the eight days allowed him, he "may obtain a rule for eight days further time to plead, from the expiration of the first eight days, undertaking to go to trial at the following assizes (*i*)." This rule is granted by the Prothonotary, of course, is absolute in the first instance, and the time given by it, runs, not from the period of its being taken out, but from the expiration of the original time for pleading. Only one such rule can be had; and that, on the Defendant's undertaking to go to trial at the following assizes: if, therefore, the Defendant requires further time than the rule allows, or does not wish to be bound to go to trial at the next assizes, he must apply for time, to one of the Judges of the Court, upon special grounds; or, (if the case comes within the general rule to be next noticed), he may obtain a rule nisi for further time, from the Prothonotary.

In other cases.

(*f*) See post as to *Oyer*, B. 5, ch. 6.

(*g*) Reg. Gen. [3] Aug. Ass. 41 Geo. 3.

(*h*) *Fagg v. Borsley*, 2 Dowl. P. C. 107.

(*i*) Reg. Gen. [2] Aug. Ass. 2 W. 4. As to how the days are calculated, see post pa. 130.

By the general rule just adverted to (*j*), it is provided, that in actions commenced by process returnable in the several months of *March* and *August* respectively, if the Defendant, and his attorney, shall make and file in the Prothonotary's office, an affidavit stating that the former hath good grounds of defence to such action, as it is believed, and that he cannot safely proceed to plead or try at the then next assizes, for want of due time to prepare the pleadings, or to procure the attendance of some material witness, or for some other purpose necessary to the defence; and at the same time undertaking to plead issuably, rejoin gratis, and take short notice of trial, for the then next assizes, if the application should be eventually refused: and, also undertaking not to bring a writ of Error, then, and in every such case, the Prothonotary may issue a rule to *shew cause* why such Defendant should not have time to plead for *twenty-one* days next after such rule shall be made absolute, or why the trial should not be postponed.

The Judges of this Court, or any two of them, are empowered by the late Act (*k*) to make such orders, rules, and regulations, for altering and regulating the mode of pleading in this Court, and for altering the mode of entering and transcribing pleadings, judgments, and other proceedings, as to them shall seem meet. Mode of pleading.

All pleadings in this Court are filed with the Prothonotary, and not delivered between the parties; and before, or at the time of filing the plea, an office-copy of the declaration must be taken, (or at least paid for), by the Defendant, in all cases, except in actions of ejectment commenced by declaration, and where the Defendant has been served with a copy of the declaration in gaol: and an office-copy of every *special* pleading must be taken, or paid for, by the party answering it.

As the same forms of pleadings are adopted in this Court, General Forms
as in the Courts at Westminster: and as the general rules of pleas &c.
of Hil. T. 4, W. IV., on this subject, framed in pursuance

(*j*) Reg. Gen. Aug. Ass. 49 Geo. 3. & see Reg. Gen. [1] Mar. Ass. 5 W. 4. ante pa. 52. But *quære* whether the rule of Aug. Ass. 49, Geo. 3. is applicable to cases under the new process.

(*k*) 4 & 5 W. 4. c. 62, s. 17.

of the statute 3 and 4, W. IV., c. 42, s. 1, apply to all Courts of common law; and are part and parcel of the law of the land (*l*), it will suffice in a work like this, to refer the practitioner to the treatises on pleading, for the forms of pleas, and rules relating to them.

Rule to prevent
a sham plea of
Judgment re-
covered.

It may be proper, however, to give at length, an express rule of this Court (*m*) lately made, to prevent a *sham* plea of judgment recovered. By this rule it is ordered, that "where a Defendant shall plead a plea of judgment recovered in another Court, he shall, in the margin of such plea, state the date of such judgment: and, if such judgment shall be in a Court of Record, the number of the roll on which such proceedings are entered, if any: and in default of his so doing, the Plaintiff shall be at liberty to sign judgment as for want of a plea: and in case the same be falsely stated by the Defendant, the Plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court, where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court, or one of the Judges thereof (*n*)."

Special Pleas.

By an old rule of this Court (*o*) it is ordered, that "all demurrers, and special pleas (*p*), shall be signed by Counsel before the same be received or filed in the Prothonotary's office:" but this rule has been qualified by another (*q*), which provides that, "when any pleadings conclude to the Country, it shall not be necessary to have them signed by Counsel." If Counsel's hand be omitted, in a case requiring it, the Plaintiff may sign judgment (*r*).

(*l*) Per Denman, C. J. in *Roffy v. Smith*, 6. Car. & P. 662.

(*m*) Reg. Gen. [3] Mar. Ass. 4 W. 4.

(*n*) This rule does not extend to a plea by an Executor, of Judgments against him, by other Creditors: the meaning of the rule being "Judgments recovered, which are answers to the action." Per Tindal C. J. in *Power v. Fry*, 3 Dowl. P. C. 140.

(*o*) Reg. Gen. Mar. Ass. 19 Geo. 2.

(*p*) In general, a plea concluding with a verification, requires counsel's hand. See *Macher v. Billing*, 3 Dowl. P. C. 246. And see a list of pleas requiring counsel's signature, Chitty on Pleading, 6th Ed.

(*q*) Reg. Gen. [39] Mar. Ass. 2 W. 4.

(*r*) At what time, and in what other cases, Judgment may be signed for an irregularity in pleading, see post pa. 129.

Pleas in *abatement* must also be signed by Counsel, and verified by affidavit. The affidavit must not be sworn before the declaration is filed (*s*); and if it be inaccurate in any respect, the plea will be a *nullity* (*t*).

As to pleading a *nonjoinder*, and the subsequent proceedings thereon; and the course to be pursued in order to take advantage of a *misnomer*, which cannot now be pleaded—see statute 3 and 4, W. IV., c. 42, s. 8, 9, 10, 11; and rule (20), of Hil. T. 4, W. IV. See also Archb. Pr. (by Chitty) 114-544.

We have seen that the general pleading rules of Hil. T. 4 W. 4, framed pursuant to 3 & 4 W. 4, c. 42, are adopted in this Court. Hence, "several pleas, or avowries, or cognizances, shall not be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each;" for example, "Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin, are within the rule), are not to be allowed (*u*)."

Where several pleas are used in apparent violation of this rule, application may be made to strike them out, at the cost of the party pleading (*v*); and the Prothonotary is authorized (*w*) to grant a rule to shew cause why a party should not be allowed to strike out such pleas. But if a distinct ground of defence, is *bona fide* intended, it is no objection to several pleas, that they are inconsistent with each other (*x*); provided that one of them would not establish, on the face of the record, the falsity of the other, as *non assumpsit* to the whole, and payment as to part (*y*).

(*s*) *Bower v. Kemp*, 1 Dowl. P. C. 261. 1 Cr. & J. 287. *S. C.* *Westerdale v. Kemp*, 1 Tyr. 260. *Johnson v. Popplewell*, 2 Cr. & J. 544.

(*t*) *Garratt v. Hooper*, 1 Dowl. P. C. 28. Chitt. Gen. Prac. vol. 3 part 6, pa. 713.

(*u*) See Rule [5] as to what pleas are allowed to be joined: and as to the consequence of introducing more pleas than are necessary, see post B. 5, ch. 22.

(*v*) See further on this subject, post B. 5, ch. 22, on costs.

(*w*) Reg. Gen. [19] Mar. Ass. 5. W. 4.

(*x*) *Duer v. Triebner*, 3 Dowl. P. C. 133. *S. C. nom.* *Triebner v. Duer*, 1 Bing. N. C. 266. *Wilkinson v. Small*, 3 Dowl. P. C. 564.

(*y*) See Chitty's Gen. Prac. Vol. 3, part 6, pa. 736. referring to *Steill v. Sturry*, 3 Dowl. P. C. 133, & *Thompson v. Bradbury & others*, Id. 147.

Rule to plead
several matters.

Nisi.

Absolute in the
first instance.

Double pleas cannot be filed without leave of the Court, and the mode of obtaining such leave, has lately been altered. Formerly the Prothonotary was empowered (z) to grant (without the previous order of a Judge), a rule *absolute* for a Defendant to plead several matters, on producing counsel's hand (when necessary). In practice, however, such rule was issued, of course, without motion or affidavit, or even counsel's hand; and was generally taken out at the time of filing the plea: but, by a late rule, (a) is ordered, "that in future, rules to plead several matters, or to make "several avowries or cognizances, shall be drawn up upon "a Judge's order, to be made upon a rule to shew cause to be "granted by the Prothonotary or his deputy, accompanied "by a short abstract or statement of the intended pleas, "avowries, or cognizances; provided that no such rule "shall be made absolute, until leave to that effect shall "have been actually given by one of the Judges of this "Court, testified by his signature to the order. *Provided* "also, that no rule to shew cause or Judge's order shall "be necessary in the following cases, that is to say, where "the plea of *non assumpsit*, or *non detinet*, or never was "indebted, with or without a plea of tender as to part, a "plea of the statute of limitations, set-off, bankruptcy of "the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and "coverture, or any two or more of such pleas, shall be "pleaded together; but in all such cases, a rule shall be "drawn up by the Prothonotary or his deputy, upon the "production of the ingrossment of the pleas."

It being now necessary to apply to a Judge for leave to plead all double pleas, except those mentioned in the above rule; and as it takes a week or thereabouts to obtain an order for that purpose, it is incumbent on the Defendant's attorney, whenever the defence is one that is likely to require such an order, to get the plea drawn without delay; for it would seem, that the rule nisi to plead several matters is not a stay of proceedings from the service, though it has been held to have that effect, from the time of shewing

(z) By Reg. Gen. Mar. Ass. 52 Geo. 3.

(a) Reg. Gen. [15] Mar. Ass. 5 W. 4.

cause, if the rule be returnable when the judgment office opens on the day after the time for pleading expires (b).

The party taking out a rule *nisi* to plead several matters, must serve the same, and deliver a short abstract of the proposed pleas, at the same time. An affidavit of the service of the rule and abstract, should, on applying for an order, be laid before the Judge, who will either allow the pleas, or strike out some of them, or, (if he thinks a double plea unnecessary,) refuse the order. If all the proposed pleas are allowed, the Judge's order simply directs that the Defendant be at liberty to plead the several matters mentioned in the abstract delivered, or annexed: but if some of the pleas are disallowed, the order either specifies the pleas to be filed, or refers to the abstract annexed, in which the objectionable pleas are struck out. A rule absolute is obtained on the order, and served as in other cases.

Mode of obtaining an order to plead several matters.

Whenever a plea is irregularly filed, either for want of counsel's signature, or a rule to plead several matters, or (if in abatement) an affidavit of verification, the Plaintiff may treat it as a nullity, and sign judgment, *at the expiration of the time for pleading* (c). And where the plea is frivolous, the Court will set it aside (d).

Signing Judgment after an irregular plea.

"The Defendant shall not be at liberty to *waive* his plea without leave of the Court, or one of the Judges thereof (e); but a plea may be withdrawn by consent of the parties: and if it become necessary to amend the plea, a rule *nisi* for that purpose may be had from the Prothonotary (f), who is also empowered (g) to issue "rules *absolute* to "amend pleas, by adding or substituting a plea of pay-

Waiving plea.

Amending plea.

(b) *Wells, v. Secret*, 2 Dowl. P. C. 447.

(c) *Pepperell v. Burrell*, 2 Dowl. P. C. 674. 1 Cr. M. & R. 372. 4 Tyr. 811, S. C. *Hockley v. Sutton*, 2 Dowl. P. C. 700. *Macher v. Billing*, 3 Id. 246. 4 Tyr. 812. S. C. *Nolleken v. Severn*, 2 Cr. & J. 333, 1 Dowl. P. C. 320. S. C.

(d) *Rix v. Kingston*, 3 Dowl. P. C. 159.

(e) Reg. Gen. [22] Mar. Ass. 2 W. 4.

(f) Reg. Gen. Mar. Ass. 57 Geo. 3.

(g) Reg. Gen. [16] Mar. Ass. 5 W. 4.

"ment or further payment of money into Court, or of set-off, or both; the Defendant undertaking, by such rule, to go to trial at the following assizes."

Notice of plea.

Particulars of set-off to be delivered with notice of plea of set-off.

On filing a plea, avowry, replication, demurrer, or other pleading, a *notice* must be given by the attorney or agent filing the same, to the attorney or agent on the other side (*h*); and when a Defendant pleads a set-off, he must, with the notice of such plea, deliver a full particular of such set-off, if the particulars can be comprised within *three* folios; but if not, he must deliver such a statement of his set-off, as may be comprised within that number of folios; and in default of such delivery, he will be precluded from giving any evidence of his set-off (*i*). The same rule formerly applied to a notice of set-off, when given at the time of pleading the general issue.

Time for a Plaintiff to Reply, Surrejoin, &c.

With respect to the *time for a Plaintiff to Reply, Surrejoin, Surrebut, &c.*, it is provided (*j*), that he "shall not in any case be compelled to reply to, or answer any pleading filed by a Defendant, until the rule day (*k*) next after the filing such pleading; nor in case such rule day shall happen within eight days next after the filing such pleading, until the second rule day after the filing such pleading."

Further time to reply.

If further time to reply be required, the Plaintiff may obtain a rule *absolute* for that purpose from the Prothonotary (*l*), who allows such time as he thinks proper—generally ten or fourteen days. A rule for ten days' time, gives the whole of the tenth day, excluding the day of granting the rule (*m*); a rule for time "until" a day men-

(*h*) Reg. Gen. [5] Aug. Ass. 38 Geo. 3.

(*i*) Reg. Gen. [11] Aug. Ass. 2 W. 4. and see further as to particulars of Set-off, post B. 5, ch. 3.

(*j*) Reg. Gen. [2] Aug. Ass. 41 Geo. 3.

(*k*) As to the duration of the rule day, see ante pa. 42.

(*l*) Reg. Gen. Mar. Ass. 57 Geo. 3.

(*m*) *Pepperell, v. Burrell*, 2 Dowl. P. C. 674. 1 C. M. & R. 372. S. C. 4 Tyr. 811, S. C. And see Reg. Gen. [65] Mar. Ass. 2 W. 4. ante pa. 78.

tioned, includes that day (*n*). And a month's time means a *lunar* month (*o*). In default of the Plaintiff's filing a replication, or other pleading, the Defendant after demanding the same (*p*), may sign nonpros.

The time for a *Defendant* to rejoin, rebut, &c., is regulated by rule of Court (*q*), which provides "that when any pleading by way of reply, or answer, or for the joining of issue, be required (*r*), the same shall be filed within *eight* days next after service of notice of the previous plea, otherwise judgment may be signed for want thereof" after a proper demand (*p*). Time for a defendant to rejoin, rebut, &c.

It is not the practice of this Court to rule a party to reply, rejoin, &c.

(*n*) *Dakins v. Wagner*, 3 Dowl. P. C. 535.

(*o*) *Soper v. Curtis*, 2 Dowl. P. C. 237.

(*p*) As to such demand, see post B. 3 ch. 1. *per 178 Reg.*

(*q*) Reg. Gen. [5] Aug. Ass. 38 Geo. 3.

(*r*) That is required to be filed by the defendant. See Reg. Gen. [2] Aug. Ass. 41 Geo. 3.

BOOK 2. CHAP. VIII.

OF MAKING UP THE ISSUE.

Making up the
Issue.

An issue in *fact* is not completely joined until a similiter is filed : but in a late case (*a*) where the Defendant's plea concluded with an "&c.," it was considered as including the similiter, and was held sufficient *after verdict*.

Time for joining issues, for trial at the Assizes.

There is no period prescribed by the rules or practice of this Court, for making up issues in *law*, so as to be in time for argument at the following assizes (*b*) ; but by a late rule (*c*) it is ordered, that " whenever an issue in *fact* in " any personal action shall be joined eight days (exclusive) " before an assizes, the cause shall stand for trial at such " assizes." When this rule was made, the assizes were held at Lancaster only, and since they have been holden at Liverpool also, it has been considered in practice, sufficient, if the issue be joined *eight* days (exclusive) before the commencement of the assizes, at the place where the cause is intended to be tried.

If the last pleading of the Defendant concludes to the country, the Plaintiff may file a similiter forthwith ; and, if filed eight days (exclusive) before the assizes, the cause stands for trial, at such assizes, of course, and without notice of trial ; the notice of similiter in this Court, being deemed equivalent to a notice of trial.

It has been seen that a *Defendant* must answer the previous pleading, within eight days after notice thereof : but if there should not be eight days between the filing of such previous pleading, and the period at which the

(*a*) Swain & others v. Lewis, 3 Dowl. P. C. 700.

(*b*) The Record, however, must be brought into the Prothonotary's office one day [exclusive] before the assizes—see the next Chapter.

(*c*) Reg. Gen. [14] Mar. Ass. 5, W. 4.

issue must be joined to be in time for the following assizes, and the Plaintiff is desirous of going to trial at such assizes, he may file a similiter; it being provided (d), that "whenever an issue shall be tendered in pleading, by, or on the part of the Plaintiff, such Plaintiff, may, (in case of the Defendant's default), on the last day prescribed by the rules of this Court, for making up such issue in time for trial, at the then next assizes (e) add a similiter to such pleading, and give notice thereof, to the Defendant's attorney, or agent: but that such Defendant may, within five whole days, next after such notice, strike out such similiter, and file and give notice of a demurrer: and that in case the Plaintiff shall join in such demurrer, then the Defendant, his attorney, or agent, upon the Plaintiff's entering or filing such joinder in demurrer, shall be obliged to accept of notice of executing a writ of Inquiry, at the then next ensuing session of assizes; every such notice being given two (f) days, exclusive, before the day of executing such inquiry."

When a plaintiff may add a Similiter to his own pleading.

The above rule confines to a party who is *Plaintiff* the power of adding a similiter to his own pleading: but, such advantage has, by a subsequent rule (g), been extended to a *Defendant* in an action of replevin.

In making up an issue in *fact*, it is not the practice of this Court, to conclude with the award of venire; though this must be introduced on the roll, when the issue is recorded (h). A copy of the issue is not delivered to the Defendant's attorney, or agent, as is required by the practice of the Courts at Westminster.

(d) Reg. Gen. Mar. Ass. 42, Geo. 3.

(e) This rule does not apply to the case of an issue for trial before the Sheriff.

(f) But see post B. 3, Ch. 2, for a late rule as to the notice of Inquiry.

(g) Reg. Gen. Mar. Ass. 2, Geo. 4—see post B. 4, Ch. 2, on Replevin.

(h) See post B. 2, Ch. 10.

BOOK 2. CHAP. IX.

OF PROCEEDINGS ON DEMURRER.

Time for filing
demurrer, and
joinder.

Parties have the same time to demur, and join in demurrer, as they have to plead, reply, rejoin, &c. (a) : but by a late rule (b), (referring to another rule which directs, that the notice of declaration shall contain, among other things, the time limited for a Defendant to plead), it is ordered, that "all pleas in abatement and demurrers, shall be filed "before, or immediately upon the expiration of such notice "to plead; and if filed at any time afterwards, the Plaintiff may sign judgment as for want of plea." By the terms of this rule its application is limited to demurrers to declarations; and there is no rule of Court, prohibiting the filing of demurrers to subsequent pleadings, at any time before judgment. If a joinder in demurrer be not filed in due time, the opposite party may, after demand thereof (c), sign judgment (d).

As to a Defendant's striking out a similiter, and demurring—see ante pa : 133, and, as to a Plaintiff in replevin, doing so—see post B. 4, Ch. II.

When the Defendant is obliged to accept notice of inquiry.

By general rule of Lent assizes, 19, Geo. II. it is ordered that "in all cases where Defendant demurs to Plaintiff's declaration, Defendant, his attorney, or agent, "shall be obliged to accept of notice of executing writ "of inquiry on Plaintiff's entering or filing his joinder "in demurrer: and in case Defendant pleads such a "dilatory plea, that Plaintiff is obliged to demur to it, then "Defendant his attorney, or agent, shall be obliged to

(a) See ante pa. 123. as to pleading; and as to replying, rejoining, &c. see ante pa 130-131.

(b) Reg. Gen. [3] Aug. Ass. 2, W. 4.

(c) See post B. 3, Ch. 1, as to such demand.

(d) Reg. Gen. [5] Aug. Ass. 38, Geo. 3.

"accept notice of executing inquiry, after the filing, or
 "entering of such demurrer: and in every case where
 "Plaintiff shall conclude to the country, upon Defendant's
 "plea, and thereupon Defendant, in order to hinder the
 "trial of the issue at the ensuing assizes, shall demur in
 "law, to the replication, or plea of Plaintiff, and Plaintiff
 "shall join in such demurrer, then Defendant, his attorney
 "or agent, upon Plaintiff's entering or filing such joinder
 "in demurrer, shall be obliged to accept of notice of exe-
 "cuting a writ of inquiry, at the then next or ensuing
 "session of assizes; every such notice being given by
 "Plaintiff's attorney, of the time and place of executing
 "the same *six* (e), days exclusive before, according to the
 "custom and practice of the Court."

The forms of demurrer and joinder, are prescribed by the 14th general rule, as to pleading, of Hil. T. 4, W. IV., which rules we have seen, have been adopted in this Court, so far as they are applicable (f).

The demurrer must be signed by Counsel, before it is filed (g); but to a joinder in demurrer, no such signature is necessary; nor will any fee be allowed, in respect thereof (h).

In order to prevent *frivolous* demurrers, it has lately been provided, that "in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued, shall be stated; and if any demurrer shall be filed without such statement, or with a frivolous statement, it may be set aside as irregular, by the Court, or a Judge; and leave may be given to sign judgment as for want of a plea: provided that the

(e) By rule [1] of Aug. Ass. 2, W. 4, the notice of Inquiry must "in all cases" be four days exclusive. See post B. 3, Ch. 2.

(f) *Forms of Demurrer and Joinder as prescribed by the Rule.*

[To be intituled as other pleadings].
 "The said Defendant by his Attorney," [or "in person," &c, or "Plaintiff"] "says that the declaration [or "plea," &c.] is not sufficient in law." Shewing the special causes of demurrer, if any.

Joinder.
 "The said Plaintiff, [or "Defendant"], says that the declaration [or "plea," &c.] is sufficient in law."

(g) Reg. Gen. Lent Ass. 19, Geo. 2.

(h) Reg. Gen. [2] Mar. Ass. 4, W. 4.

"party demurring, may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court, or one of the Judges thereof, in the usual way (i)."

This rule is not complied with by a general statement in the margin (as, that "the matters disclosed in the plea contain no answer to the action"); but some special ground must be stated: one point, however, is sufficient (ii). What may be deemed a frivolous point, it is difficult to define (j). The consequence of omitting the marginal note is, that the demurrer may be set aside for irregularity; but it affords no objection to the demurrer being argued (k).

When joinder must be filed to be in time for the assizes.

It is not necessary that issues in law should be joined, (as issues in fact are required to be), a definite period before the assizes, in order to be in time for argument then: it is sufficient if the joinder in demurrer be filed at any time, provided the record be brought into the Prothonotary's office one day (exclusive) before the first day of the assizes, as required by rule of March assizes, 51 Geo. III (l).

Preparing the Record.

The Plaintiff in demurrer should prepare the record; and in default thereof, the Defendant may do so. The mode of preparing, as well as the time for ordering, the record, and bringing it to the Prothonotary, is the same, as in issues in fact (l).

It was formerly the practice to enter on the roll, after the joinder in demurrer, a continuance by *curia advisare vult*, or several such continuances, where the demurrer was not argued at the first assizes after issue joined: but since the 2nd general pleading rule of Hil. T. 4, W. IV., which abolishes the entry of all continuances, it would

(i) Reg. Gen. [1] Mar. Ass. 4, W. 4.

(ii) *Ross v. Robeson*, 3 Dowl. P. C. 779.

(j) But see *Cresswell v. Crisp*, 2 Id. 635. *Tyndall & ano. v. Ullsboorne*, 3 Id. 2. *Lyons v. Cohen*, Id. 243.

(k) *Lacey v. Umbers*, 3 Dowl. P. C. 732.

(l) See post pa. 143.

seem, that no such entry is necessary, nor ought to be made (H): and, that after the issue on demurrer is joined, the next entry, is the judgment, which the Prothonotary inserts on the roll. Where, however, there is an issue in fact, as well as in law, there must be entered on the roll, an award of the *venire*, a form of which is suggested below (m).

The demurrer must be entered with the marshal within the time allowed for entering issues in fact (n); and if the Plaintiff in demurrer do not enter it, the Defendant may move the Court, for judgment on the demurrer, for not setting the same down for argument; and after judgment, may proceed to execute an inquiry, if one be necessary; if not, to execution (o). Entry for argument.

Before the day fixed for argument (p), the Plaintiff in demurrer must prepare two demurrer or paper books, one to be delivered to his Counsel, and the other to the junior Judge; and the Defendant in demurrer, should also prepare one paper book for his Counsel, and another for the senior Judge (q). These books are merely copies of the proceedings, as entered on the record; but when the demurrer is to part only of the declaration, or other pleading, those parts only of the pleadings to which the demurrer relates, should be copied into the demurrer books; and if any other part be copied, the Prothonotary will not allow the costs thereof, on taxation, either as between party and party, or attorney and client. The matters to be argued, should be stated in the margin of the Paper Books. Preparing paper books.

No time is prescribed by rule of this Court, for delivering the paper books to the Judges; but by analogy Delivering paper books to the Judges.

(H) See post pa. 143; but see Chitty's forms to Archb. Pr. 359-360.

(m) *Award of Venire after issues in law and fact.*

"Therefore for trying the issue above joined between the said parties, whereupon they have put themselves upon the Country, the Sheriff of the County aforesaid, on the day of in the year of Lord according to the form of the statute in such case made and provided, is commanded, that he cause to come, &c. [conclude as in the form in the next Chapter]."

Where one Defendant has pleaded to issue, and the other demurred—see form of *Venire*, Lee's Dictionary of Pr. pa. 1179.

(n) Evans' Pr. 89.

(o) Id. 90.

(p) Post pa. 138

(q) Evans' Pr. 89.

to the practice of the Courts at Westminster, as established by a late rule, it may be proper to deliver them, if practicable, four clear days before the day fixed for argument. If either party neglect to deliver his demurrer books, the other party should deliver them for him, and will then be entitled to judgment, otherwise the cause will be struck out of the paper; and if the demurrer-books be delivered without a proper joinder, the Court will not hear the argument (r).

Where there are issues in law and fact, which to be tried first.

When there are issues both in fact and in law, the Plaintiff may try either issue first, at his election: but it is often advisable to determine the demurrer first (s); and although in ordinary cases, a Plaintiff has this election, yet, if the Court see that the ends of justice will be better attained by determining the issue in law first, they will postpone the trial of the issue in fact (t).

The argument.

The argument generally takes place before the junior Judge, sometimes in Court, but more frequently at the Judges' lodgings; and one Counsel only, on each side, is allowed to argue (u). It is not the practice of this Court to move for a *concilium*. The Judge fixes the time of argument without motion; and as soon as fixed, notice of the time and place of argument must be given to the opposite party (u).

Amendment.

The pleading demurred to, will be allowed to be amended at the time of the argument; and, under special circumstances, even after judgment (v).

Judgment.

If there be no argument, Counsel moves for judgment, as of course (w); and on the decision of the demurrer, judgment is ordered to entered, for the Plaintiff, or Defendant, as the case may be (x). If the Plaintiff in the cause succeeds on demurrer, the judgment is either interlocutory, or final, according to the nature of the action, as in the case

(r) *Abraham v. Cook*, 3, Dowl. P. C. 215. *Howorth v. Hubbersty*, Id. 457.

(s) See 2 Saund Rep. 300, [n. 3.]

(t) *Burdett Bart. v. Colman*. Same v. Earl Moira, 13 East. 27.

(u) *Evans' Pr.* 89.

(v) *Atkinson v. Bayntun*, 1 Bing. N. C. 740.

(w) *Arch. Pr.* [by Chitty] 555.

(x) See *Tidd's Pr.* [9th Ed.] 740.

of a judgment by default. When final, an execution may be issued, as in other cases of causes entered for trial (y) : and, when interlocutory, an inquiry must be executed, or the Plaintiff must proceed to compute before the Prothonotary. But judgment for the Plaintiff on demurrer to a plea in *abatement* is not final, but only a *respondeat ouster* (z).

By the law amendment act (a) it is provided, that where judgment shall be given either for or against a Plaintiff or Demandant, or for or against a Defendant or Tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs, in that behalf. Costs.

(y) See post B. 5, Ch. 22.

(z) Tidd's Pr. [9th Ed.] 740.

(a) 3 & 4, W. 4, c. 42, s. 34.

BOOK 2. CHAP. X.

OF PREPARING THE RECORD FOR TRIAL OR ARGUMENT
AT THE ASSIZES (a).

By whom the
Record is pre-
pared.

Formerly, the records of issues for trial at an assizes, were prepared by the Prothonotary; but the increase of business rendering this inconvenient, it is provided by rule of Court, that all records of issues in law, or in fact, to be entered for argument or trial, and also the paper books of such issues in law, shall be drawn up and engrossed, by the attorney, or agent, entering the same—who shall be allowed for preparing the same, four pence per folio, to be deducted out of the antient fee of eight pence per folio, payable to the Prothonotary at the time of entering such records for argument or trial; and where any such cause shall be settled after the record shall have been enrolled and before the same shall be entered for trial or argument, the attorney, or agent, preparing such records, shall be allowed a fee of four pence per folio, payable by the party liable to the costs in such cause (b). The proper party to prepare the record is the Plaintiff, if he bring on the cause for trial; or the Defendant, if the cause be brought to trial by *proviso*; but, in replevin, as both parties are actors, either of them may prepare it.

Ordering the
Record.

Previously to enrolling the record, the party must order the same at the Prothonotary's office; which is done by entering in a book kept there, for that purpose, the name of the cause, and the number of its entry in the Imparlance book.

(a) As to preparing records in actions to be tried before the Sheriff, &c.—see post B. 5, Ch. 10: and as to the records of this Court, in general, see ante pa. 45.

(b) Reg. Gen. Mar. Ass. 51, Geo. 3.

The time for ordering the records was formerly regulated by the return of the process, whereby the action was commenced; or (which is the same thing), the first day for ordering the record, used to be the last, for making up the issue in time for trial: thus it was provided, by rule of Court (c), that on writs returnable in the months of February and March, July and August, (where the issues had been joined between such returns respectively, and the then next assizes), the records were to be ordered for trial, at least *seven* whole days before *such* assizes; and, in all other cases, at least *fourteen* days, before the assizes at which the cause was intended to be tried. Although, by this rule it would seem to have been peremptory on a party, to order the record 7 or 14 days at least, before the assizes, yet, in practice, the record has been permitted to be ordered at any time before the day preceding the first day of the assizes.

Time for ordering Records.

Former practice

By the abolition of the return days in process for the commencement of personal actions, the above rule is become inapplicable; and according to the present practice, the time for ordering the records is as follows, viz.:—on the *fifteenth* day (exclusive) before the Lancaster or Liverpool assizes, in all cases where the issues shall be joined before or on that day; and, in all other cases, on the *ninth* day (exclusive) before the assizes (d).

Present practice.

The Prothonotary provides parchment rolls, for the attorney, or agent, applying for the same, at the several periods appointed for ordering the records, but not sooner (e). The pleadings must be copied verbatim, to the end of the issue; and when one or more of several Plaintiffs or Defendants may have died, after issue joined, and before trial, and the cause of action survives, a suggestion of the death is filed with the Prothonotary, and entered on the roll (f). The record concludes with an award of the writ

How the Record is prepared.

(c) Reg. Gen. [4] Aug. Ass. 41, Geo. 3.

(d) The days for ordering the records are always stated in the Assize circular, issued from the Prothonotary's office.

(e) Reg. Gen. Mar. Ass. 51, Geo. 3.

(f) As to the propriety of this entry *before trial*—see *Rex v. Cohen*, 1 Starkie's Rep. 511. An eminent writer observes, that the proper time

of *venire facias juratores*—a form of which is given below (g). Formerly such writ was dated on the last day of the preceding assizes; and the practice then was, to add the award of it, at the time of engrossing the record: but as the *venire* is now required to be dated on the day before the following assizes (h), it would seem to be improper to introduce such award until that day.

Both sides of the parchment may be written upon; and when the pleadings in more than one action are engrossed on the same parchment, a space should be left between each action, for the enrolment of the judgment, which is afterwards added by the Prothonotary.

Rules of Hil. T.
4 W 4, relating
to the Record.

In preparing the record, it will be proper to attend to the general pleading rules of the Courts at Westminster, of Hil. T. 4, W. IV., by which it is provided, that “every declaration, and other pleading, shall be entered on the record made up for trial, and on the judgment-roll, under the date of the day of the month and year, when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court, or a Judge.” That “no entry shall be

for suggesting a death, is at the commencement of the pleading next afterwards: See Chitt. Gen. Prac. Vol. 3, part 6, pa. 768: and see a concise form of such suggestion, Id. pa. 701: see also, forms, 2 Chitt. on pleading, [6th Ed.] pa. 15; and Chitty's Col. Stat. Tit. Abatement, pa. 2. [note c.]

(g) *Award of Venire.*

Therefore, on the day of
in the year of our Lord [the day next preceding the first
day of the Lancaster or Liverpool Assizes unless they begin on a
Monday, and then on the Saturday preceding], according to the form
of the statute in such case made and provided, the Sheriff of the
County aforesaid, is commanded, that he cause to come before the Justices
of the Lord the King, of his Court of Common Pleas for the County
Palatine of Lancaster, at Lancaster, [or “Liverpool”], on the day of
instant, being the first day of the next general Session of Assizes
here [or if at Liverpool “there”] to be holden, twelve, &c. by whom,
&c. and who neither, &c. to recognize, &c. because as well, &c.

Note. For the variations where there are several issues in fact—or where
several defendants have pleaded separately—or where some of them have
suffered Judgment by default, &c., &c.; see Chitty's forms to Arch. pa.
116 & seq. Tidd's Prac. forms pa. 281 & seq. and where there are issues in
law and fact, see ante pa. 137.

(h) See Stat. 4 & 5 W. 4, c. 62, s. 33.

"made on record, of any warrants of attorney, to sue or defend:" nor "shall any entry of continuances by way of imparlance, *curia advisare vult, vicecomes non misit breve*, or otherwise, be made upon any record, or roll, whatever, or, in the pleadings, except the *jurata ponitur in respectu*, which is to be retained (i)." And that "the entry of proceedings on the record for trial, or on the judgment-roll, (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever."

The engrossment of the records is required, by Rule of Mar. Ass. 51 Geo. 3, to be brought into the Prothonotary's office one day (exclusive) before the first day of the assizes, at which the causes are intended to be entered for trial, or argument.

When the records must be brought to the Prothonotary.

As to annexing particulars of demand, and set-off, to the record—see post B. 5, Ch. 3.

(i) The entry of the *jurata* is only applicable to the Courts at Westminster.

BOOK 2. CHAP. XI.

OF NOTICE OF TRIAL FOR THE ASSIZES (a); AND OF
COUNTERMAND.

Notice of trial,
when it is ne-
cessary.

We have seen that whenever an issue in *fact*, in any personal action, is joined eight days (exclusive) before an assizes, the cause stands for trial at such assizes (b) and this it does, of course, and *without notice*: but, "if the cause be not tried at such assizes, the Plaintiff, or the Defendant if he brings it on by *proviso*, shall give eight days' (exclusive) notice of trial, previous to any subsequent assizes (c):" and notice of trial for such subsequent assizes, would seem to be necessary, even though the Plaintiff has given a peremptory undertaking to try (d); or the trial has, by rule of Court, been put off (e), or fixed for a certain day (f). It is also prudent to give notice, where the cause has been made a *remanet* (g).

What notice to
be given in or-
dinary cases.

Month's notice
when required.

Where a term's notice of trial is necessary by the practice of the Court of Common Pleas at Westminster, a full four weeks' notice must be given in this Court (h). The Court of Common Pleas at Westminster requires a term's notice, where no proceedings have been taken in the cause, for four terms, exclusive of the term in which the last proceeding was had; and, as to what is deemed such a proceeding as will dispense with this notice—see 1 Sell. 408. Arch. (by Chitty) 269-270. Tidd's Pr. (9th Ed.) 756.

(a) As to notice of trial before the Sheriff, &c., under the statute 4 and 5, W. IV., c. 62, s. 20—see post B. 5, Ch. 10.

(b) Ante pa. 132.

(c) Reg. Gen. [14] Mar. Ass. 5, W. 4.

(d) Ifield v. Weeks & ano., 1, H. B. 222.

(e) Jacks v. Mayer, 8, T. R. 245.

(f) Ellis v. Trusler, 2, Bl. Rep. 798.

(g) See Gains v. Bilson, 4, Bing. 414. Jacks v. Mayer, *supra*, and Shepherd v. Butler, 1, D. & R. 15. Ham v. Gregg, 9 Id. 125. 6, B. & C. 125, S. C.

(h) Reg. Gen. [14] Mar. Ass. 5, W. 4.

The rule, however, requiring a term's notice, only extends to voluntary delays of the Plaintiff; and does not apply, where the proceedings have been stayed, at the Defendant's request, or by injunction, or agreement; nor does it extend to a notice of trial by proviso (i).

There is no rule of this Court regulating the time for giving short notice of trial; but, as in the Courts at Westminster, the time for giving such notice, in a town cause, is two days, one exclusive, and the other inclusive; so by analogy to that practice, two days' notice before the assizes, is considered sufficient in this Court. If, however, the Plaintiff is prevented from giving the full notice, by the Defendant's proceeding, a less time may be deemed sufficient (j).

No particular form of notice of trial is prescribed; but the notice usually states, that the cause will be tried at the next assizes, to be holden at Lancaster, or Liverpool, as the case may be: and when this is misstated, the notice will be insufficient, if the opposite party be misled by it (k). When some of the Defendants have suffered judgment by default, the notice should be, that the issues will be tried, and the damages assessed. Contents of notice.

The notice must be given to the Defendant, or (if of a trial by proviso), to the Plaintiff, where the parties defend or sue in person; and to the attorney, if they defend or sue by attorney; or when the attorney does not reside at Preston, to his agent there; and, if several attorneys defend separately, notice must be given to each. To whom given.

There is no notice of trial by continuance, in this Court: nor is there any time limited by the rules or practice of the Court, for giving countermand notice, so as to protect the party giving it, against his adversary's costs of the day: but the notice of countermand, must be reasonable; and what is such, will depend upon the circumstances of each Countermand notice.

(i) Theobald v. Crickmore, 2, B. & Ald. 594.

(j) Lawson v. Robinson, 2, Dowl. P. C. 69. 3 Tyr. 490, S. C.

(k) Cross v. Lang, 1, Dowl. P. C. 342.

case (l). A Defendant who is under terms to accept short notice of trial, is notwithstanding, entitled to full notice of countermand (m).

To whom given. In the Courts at Westminster, it is expressly provided, that *countermand* of notice may be given either in town or country (n); and, by analogy to that practice, it would seem to be sufficient in this Court, if countermand be given either to the agent at Preston, or to the attorney residing elsewhere. If no attorney be employed, countermand notice must be given to the party himself.

Consequence of an insufficient notice of trial, or countermand. Where no notice of trial, or an insufficient one, has been given, the verdict will be set aside, without an affidavit of merits (o), provided the irregularity be not waived by defending the cause on the trial (p); and when notice of countermand is not given, or is insufficient, the opposite party may move for costs of the day (l).

(l) See further on this subject, post B. 5, Ch. 12, on Costs of the day.

(m) King v. Jones, 1, Dowl. P. C. 640. 1, Cr. & M. 71, S. C.

(n) Rule of Hil. T. 2, W. 4.

(o) Williams v. Williams, 2, Dowl. P. C. 350. Grosjean v. Manning, 2, Cr. & J. 635. 2 Tyr. 725, S. C. Kerry v. Reynolds, 4, Dowl. P. C. 234.

(p) See Fraas v. Paravicini, 4, Taunt. 545. Doe dem. Antrobus v. Jepson & an. 3, B. & Adol. 402.

BOOK 2. CHAP. XII.

OF PROCURING THE ATTENDANCE OF WITNESSES; AND
THE ADMISSION OF DOCUMENTS.

SECT. 1.

The ordinary process for compelling the attendance of Subpœna-witnesses, is by writ of *Subpœna ad testificandum*; and when the witness is required to produce documents, a *duces tecum* clause is inserted in the writ. Forms of such writs are subjoined (a).

The subpœna is made out by the party, signed by the Prothonotary, and afterwards sealed, on a docket obtained from the Cursitor. It is tested in the same manner as a writ of Summons, and (if the witness be required to attend at the *following* assizes), is returnable on the

Issuing, teste,
and return.

(a) *Subpœna ad testificandum* on a trial at the Assizes.

William the Fourth, &c., to † greeting: We command and firmly enjoin you and every of you, that all other things omitted, and every excuse set apart, you and every one of you be in your own proper persons before our Justices of our Court of Common Pleas for our County palatine of Lancaster, at Liverpool [or Lancaster], * the first day of the next General Session of Assizes there to be holden, * ‡ to testify and speak the truth in a certain matter of controversy in our Court, before our said Justices, depending undetermined between A. B., Plaintiff, and C. D., Defendant, in an action on promises [or, "of debt," or as the case may be] on the part of the said Plaintiff [or "Defendant"]: And this you are not to omit, nor any of you is to omit on pain of one hundred pounds.—Witness [the chief Justice of this Court] at Lancaster, † the day of [the day of issuing], in the year of our Reign. E. F., Attorney. Clarendon.

† The names of four witnesses may be inserted; and the writ is usually issued with a blank for the names; but see *infra* note (d).

‡ When the Subpœna is issued during the assizes, instead of the words between the asterisks, say "immediately on sight of this writ;" and teste the writ at *Liverpool*, if issued during the assizes, there.

Subpœna duces tecum, on a trial at the Assizes.

William the Fourth, &c., [as the last form, to, and including, the word "testify," then proceed as follows:] all and singular those things that you or any of you shall know concerning [here state particularly the

first day of the assizes; but if issued during the assizes, it is returnable immediately. It must "name the assizes" either at Liverpool or Lancaster, as the case may be, at "which attendance is to be given" (b). When the witness is required to attend on the trial of an issue, or on an inquiry of damages, before the Sheriff, the subpoena is returnable at the time and place stated in the notice of trial, or inquiry. Four witnesses may be named in one subpoena; and it is usual to insert their names after it is issued (c).

Service and
tender of ex-
penses.

A copy (d) of the writ must be delivered to each witness *personally*; and the writ itself must be shewn to him, at the same time, whether the witness requires its production or not (e). Personal service cannot be dispensed with on account of the difficulty attending it, unless, perhaps, where it is manifest that the witness keeps out of the way to avoid service (f). At the time of service, a sum should be tendered to the witness sufficient to cover his "reasonable" expenses, having regard to his "countenance or calling," "the distance," (g) and the particular

document | to be produced, thus, for instance, "the last will and testament of M. T., late of R., in the County of L., deceased" in our Court before our said Justices to be alleged: and then and there bring with you \$, and shew before our said Justices the said [*last will and testament*] on the trial of a certain matter of controversy in our Court before our said Justices depending undetermined, between A. B., Plaintiff, and C. D., Defendant, in an action of trespass [*or as the case may be*] on the part of the said Plaintiff [*or, Defendant*]: And this you are not to omit, nor any of you is to omit, on pain of one hundred pounds.—Witness [*as in the last form*]. E. F., Attorney. Clarendon.

§ The writ cannot be issued with a blank for the description of the documents.

§ A celebrated writer suggests the propriety of introducing a clause requiring the witness to *search for*, as well as to bring with him, the documents: See Chitt. Gen. Prac. Vol. 3, part 6, pa. 829: and the form of Subpoena there suggested.

(b) See the order of the King, of the 25th June, 1835, for holding the Assizes at Liverpool as well as Lancaster, ante pa. 39.

(c) Wakefield v. Gall, Holt's Rep., (N. P.) 526.

(d) Although it is the practice to issue the subpoena with a blank for the names of the witnesses, yet it is proper to insert all their names, before any one is served, otherwise, it might be difficult to obtain an attachment for disobedience: but see Wakefield v. Gall, *supra*.

(e) Jacob v. Hungate, 3 Dowl. P. C. 456. Wadsworth v. Marshall, 1 Cr. & M. 87. 3 Tyr. 228, S. C.

(f) Barnes v. Williams, 1 Dowl. P. C. 615.

(g) Stat. 5 Eliz. c. 9, s. 12. And see Tidd's Pr. (9th Ed.) 806, & Ashton v. Haigh, 2 Chitt. Rep. 201.

circumstances in which he is placed (*h*). The table of allowance, stated in a subsequent chapter (*i*), may serve as a guide, as to the proper sum to be tendered. But, as by the practice of the Courts at Westminster, no conduct money is required in a town cause, when the witness resides in London (*j*), though it is usual to give him one shilling, with his subpoena; so, it would seem to be sufficient to give one shilling only, in the case of a witness who resides at the assize town.

The subpoena must be served a reasonable time before the trial, to enable the witness to attend (*k*): but, subpoenas ought not to be taken out, too early; for if so, and they become useless, by countermand, or otherwise, the costs thereof will not be allowed—at all events, as against the opposite party. In practice it is considered not unreasonable to subpoena the witnesses, at any time within a fortnight before the assizes, provided the issue be joined: but there may be cases requiring the service of subpoenas, at an earlier period (*l*). At what time to be served.

The process of this Court, being operative only when executed within the County, much inconvenience was formerly felt, for want of a power to compel the attendance of witnesses, who resided out of the jurisdiction; but this inconvenience, has been remedied by the statute 4 and 5, W. IV., c. 62, s. 29 (*m*), which provides “that the service of every writ of *subpœna*, hereafter to be issued out of this Court, and served upon any person in any part of England or Wales, shall be as valid and effectual in law, and shall entitle the party suing out the same, to all and the like remedies by action, or otherwise, howsoever, as if the same had been served within the jurisdiction of this Court: and in case such person so served, shall not appear according to the exigency of such writ, it shall be lawful for the same Court, or one of the Judges thereof, Where served.
Service in any part of England or Wales.

(*h*) *Dixon v. Lee*, 3 Dowl. P. C. 259.

(*i*) See post B. 5, ch. 22.

(*j*) *Jacob v. Hungate*, 3, Dowl. P. C. 456.

(*k*) See *Tidd's Pr.* (9th Ed.) 806.

(*l*) See post B. 5, ch. 12, on costs of the day.

(*m*) See also Stat. 1 W. 4, c. 22, as to the examination of witnesses on interrogatories: and see post pa. 156.

Expence of attendance on writs of Subpoena served out of the County, to be tendered to witnesses.

"upon oath or affirmation, to be taken in open Court, or
 "upon an affidavit of the personal service of such writ, to
 "transmit a certificate of such default, under the hand of
 "one of the Judges of the same Court, to the Court of King's
 "Bench in England: and the said last-mentioned Court,
 "shall and may thereupon proceed against, and punish by
 "attachment, or otherwise, according to the course and
 "practice of the same Court, the person so having made de-
 "fault, in such and the like manner, as they might have
 "done, if such person had neglected or refused to appear
 "in obedience to a writ of subpoena, issued to compel the at-
 "tendance of witnesses, out of such last mentioned Court:
 "provided always (l), that the Court of King's Bench shall
 "not in any case proceed against, or punish any person, nor
 "shall any such person be liable to any action, for having
 "made default by not appearing to give evidence, in obe-
 "dience to any writ of subpoena, or other process, for that
 "purpose, issued under the authority of this Act, unless it
 "shall be made to appear to the Court, that a reasonable
 "and sufficient sum of money (m) to defray the expenses
 "of coming and attending to give evidence, and of return-
 "ing from giving such evidence, had been tendered to such
 "person, at the time when such writ of subpoena was
 "served upon such person."

When the Witness is in gaol, how to procure his attendance.

When the witness is a prisoner, in the gaol at Lancaster, whether under the process of this or another Court, the practice is, to bring him into the Court there, (which is attached to the gaol), by a *rule* for that purpose, granted on motion: and on such rule being delivered to the gaoler, he attends with the witness. How the Court may deal with a similar application to bring a prisoner from Lancaster, to give evidence at Liverpool, is not quite clear: but perhaps the same distinction may be laid down, as in the case mentioned in Barnes's notes (n), which was an application to the Court of Common Pleas at Westminster, in the matter of *George and Brown*, two prisoners in the fleet, the former detained there, by mesne process of the Common Pleas at Westminster, and the latter under an

(l) Sec 30.

(m) See ante pa. 149.

(n) See Tidd's Pr. (9th Ed.) 348.

execution out of the Exchequer, and where it was held that George might be brought up by *rule*; but Brown could not be brought up, without a writ of *Habeas Corpus*. When the witness is a prisoner in any other gaol, he must also be brought up by *Habeas Corpus* (a).

SECT. 2.

PROCURING THE ADMISSION OF DOCUMENTARY EVIDENCE.

Several provisions have lately been made for the purpose of lessening the expence of proving documents, or copies of them; and it is enacted, by statute 4 and 5, W. IV., c. 62, s. 17, "that it shall and may be lawful for the Judges of this Court empowered to make rules, touching the admission of documentary evidence, of this Court, for the time being, or any two of them, "from time to time to make such orders, rules, and regulations touching the voluntary admission, upon any application for that purpose, at a reasonable time before the trial of any action, of one party to the other, of all such written or printed documents, or copies of documents, as "are intended to be offered in evidence on the said trial "by the party requiring such admission, and touching the "inspection thereof before such admission is made; and "touching the costs which may be incurred by the proof "of such documents or copies on the trial of the cause, "in case of the omitting to apply for such admission, or the "not producing of such documents or copies for the purpose of obtaining admission thereof, or of the refusal "to make such admission, as the case may be, and as "to the said Judges of the said Court for the time "being, or any two of them, shall seem meet."

But independently of the power given by the above Act, this Court has made several general rules, touching the admission of documentary evidence:—thus, by rules 51 and 52 of March assizes, 2, W. IV., it was provided, that the expense of a witness, called only to prove the copy of

(a) See 44 Geo. 3, c. 102: and as to the proceedings under this Act see Tidd's Pr. (9th Ed.) 809-10. Starkie on Evid. vol. 1, pa. 112-113. Arch. Pr. (by Chitty) 292.

any judgment, writ, or other *public document*, should not be allowed in costs, unless the party calling him, should, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy; and unless such adverse party should have refused or neglected to make such admission. Nor should the expense of a witness, called only to prove the hand-writing to, or the execution of, *any written instrument stated upon the pleadings*, be allowed unless the adverse party should, upon summons before one of the Judges of this Court, a reasonable time before the trial, (such summons stating therein, the name, description, and place of abode, of the intended witness), have neglected or refused to admit such hand-writing, or execution; or unless the Judge, upon attendance before him, should indorse upon such summons, that he did not think it reasonable to require such admission.

These rules, which were confined to the admission of such documents as were of a *public nature*, or *stated upon the pleadings*, have been since altered; and the principle extended to all documents, whether of a public or private nature, and whether stated upon the pleadings or not.

Rule of Mar.
Ass. 4. W. 4.

By rule (4) of March assizes, 4, W. IV., it is ordered, that
 "either party after plea pleaded, and a reasonable time
 "before trial, may give notice to the other party, or his
 "agent, in the form annexed (p), or to the like effect, of
 "his intention to adduce in evidence, certain written or
 "printed documents; and unless the adverse party shall
 "consent, by indorsement on such notice, within forty-

(p) *Form of Notice referred to.*

In the Common Pleas at Lancaster.

A. B. v. C. D.

Take notice, that the Plaintiff [or, Defendant] in this cause, proposes to adduce in evidence the several documents hereunder specified; and that the same may be inspected by the Defendant [or, Plaintiff] his attorney or agent, at _____ on _____, between the hours of _____; and that the Defendant [or, Plaintiff] will be required to admit that such of the said documents as are herein specified to be originals, were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies, are true copies: and such documents as are stated to have been served, sent or delivered, were so served, sent, or

"eight hours, to make the admission specified, the party requiring such admission, may call on the party required, by summons, to shew cause, before a Judge, why he should not consent to such admission, or in case of refusal, be subject to pay the costs of proof; and unless the party required, shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge, or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause." "If the Judge shall think the application unreasonable, he shall indorse the summons

delivered, respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

To E. F., attorney or agent for Defendant [or, Plaintiff.] G. H., attorney for Plaintiff [or, Defendant,] by his agent.
[Here describe the documents, the manner of doing which may be as follows:]

Originals.

<i>Description of the documents.</i>	<i>Date.</i>
Deed of Covenant between A. B. and C. D. } first part, and E. F., second part .....	.....1st January, 1828.
Indenture of Lease from A. B. to C. D.....	.....1st February, 1828.
Indenture of Release between A. B. C. D. first part, &c	2nd February, 1828.
Letter—Defendant to Plaintiff .....	.....1st March, 1828.
Policy of Insurance on goods by ship Isabella, } on voyage from Oporto to London .....	.....3rd December 1827.
Memorandum of Agreement between C. D., } Captain of said ship, and E. F.....	..... 1st January, 1828.
Bill of Exchange for £100. at 3 months, } drawn by A. B. on and accepted by C. D. } indorsed by E. F. and G. H.....	.....1st May, 1829.

Copies.

<i>Description of documents.</i>	<i>Date.</i>	<i>Original or duplicate, served, sent, or delivered, when, how, and by whom.</i>
Register of Baptism of A. B. } in the Parish of X.	1st January, 1808.	
Letter—Plaintiff to Defendant, 1st February, 1828.		{ Sent by General post 2nd February, 1828.
Notice to produce papers.....	1st March, 1828.	{ Served 2nd March, 1828, on Defendant's attorney by E. F. of
Record of a judgment of the } Court of C. P. L. in an } action J. S. v. J. N.	Aug. Ass. 4th W. 4th.	
Letters patent of King } Charles 2nd in the Rolls } chapel.....	1st January, 1680.	

"accordingly; and he may give such time for inquiry or examination of the documents, intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit." "If the party required shall consent to the admission, the Judge shall order the same to be made." "No costs of proving any written or printed document shall be allowed to any party, who shall have adduced the same in evidence, on any trial, unless he shall have given such notice as aforesaid (r), and the adverse party shall have refused or neglected to make such admission; or the Judge shall have indorsed upon the summons, that he does not think it reasonable to require it." "A Judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection; and in the absence of a special order, the same shall be costs in the cause."

Proceeding under the Rule.

The mode of proceeding under the last mentioned rule, is, in the first place, to give notice to the opposite attorney, or agent, of the documents proposed to be adduced in evidence, and required to be admitted. When the documents are few, it is usual to describe them, in the body of the notice; but, if numerous, the better way is to state them, in a schedule, as prescribed by the rule.

At what time the notice to admit should be given.

Such notice ought not to be given before *plea*; but may, it would seem, be given before *issue* joined; and must be given a *reasonable* time before the *trial*. What is a reasonable time, depends upon the circumstances of the case. In general, however, about a fortnight before the assizes, is considered reasonable; and the application should not, in ordinary cases, be made at an earlier period: for if so, the costs thereof might not be allowed.

(r) Although it may seem unreasonable to apply for the admission of a document which is denied by the pleadings, yet, it appears to be necessary to do so, in order to entitle the party to the costs of proving such document. See Arch. (by Chitty) 273. But as the object of this rule is to save the expence of proving documents, whenever the expence of such proof would be less than that of applying for an order to admit, the latter course ought not to be pursued, as the Prothonotary will not allow on taxation, more than the costs of the most economical mode of obtaining the evidence.

If the 48 hours (allowed by the rule) after the inspection of the documents, be insufficient to enable the party to determine, whether he will admit them or not, he may, on application to a Judge, get further time for inquiry or examination; and the Judge may also give such directions for inspection and examination, and impose such terms on the party requiring the admission, as he shall think fit.

Inspection of the documents; and further time to consider.

If consent to the admission be given, such consent is usually indorsed on the notice; and it is advisable to obtain a Judge's order to admit, which is procured on an affidavit of the consent being given (s).

Consent to admit on notice.

"Where due notice shall have been given of a party's intention to adduce in evidence, any written or printed documents, and no consent shall have been given to make the required admission, pursuant to the rule of March assizes, 4, W. IV., the Prothonotary of this Court, or his deputy, shall and may grant a rule to shew cause, before one of the Judges of this Court, why the opposite party should not consent to such admission, or in case of refusal, be subject to pay the costs of proving the same documents (t)." The rule to shew cause is granted on production of the notice to admit; and is returnable either in London, or on the circuit: the latter, however, is more frequently the case, inasmuch as applications for admissions are generally made on the near approach of the assizes. The Judge's clerk will attend to the application, if made on the circuit; and, on the attendance before the Judge, the party should be prepared with an affidavit, as below (u), as well as an affidavit of the service of the rule.

Rule to shew cause why admission should not be made.

(s) See post pa. 156, as to such order.

(t) Reg. Gen. [18] Mar. Ass. 5, W. 4.

(u) In the Common Pleas at Lancaster.

Between A. B. Plaintiff,
and

C. D. Defendant.

E. F., of Gentleman, maketh oath and saith, that he, this deponent, did, on the day of instant, serve a copy of the notice hereunto annexed, [and of the description of the documents thereunder written,] on G. H. the agent of the attorney of the Plaintiff [or Defendant] in this cause, by delivering to, and leaving the same with J. K., a clerk of the said G. H. at his office in aforesaid,* but the said G. H. did not, nor did the said Plaintiff [or Defendant] or any person on his behalf, attend to inspect the said documents, at the time and place required by

Judge's order in case of non-admission.

If the party called upon do not attend the rule, or attending, refuse to make the admission, the Judge, has no power to order the admission to be made; but if he thinks the application reasonable, he will order (v) that the costs of proving the documents, "which shall be proved "at the trial, to the satisfaction of the Judge, or other "presiding officer, certified by his indorsement thereon, shall "be paid by the party so required, *whatever may be the "result of the cause.*" The notice to admit is attached to such order, and signed by the Judge; and a certificate of proof must be obtained on the trial, to entitle the party to the costs.

Order in case of admission.

If the consent to admit be given on the hearing before the Judge, he grants an order accordingly (w), to which the notice to admit is annexed, and signed by the Judge; and the production of the order and notice, on the trial, is sufficient to entitle the party to have the documents read, without a written admission, signed by the opposite party.

Examination of Witnesses on Interrogatories.

Some important provisions for the better procuring of evidence, have been made by recent statutes: but as these have a general operation, it may suffice in a work of this limited nature, to refer to more enlarged treatises respecting them—observing merely, in this place, that by statute 1, W. IV., c. 22 (x), the Courts at Westminster, the Court of *Common Pleas at Lancaster*, and the Court of Pleas at

the said notice; nor hath any application since been made, to inspect the same, and the admission thereof has not been made, tendered, or offered, as required by the said notice, to the best of this deponent's knowledge and belief.

Note.—If inspection has been had, but the admission refused, the form from the asterisk will be as follows. "And this deponent further saith, that the said G. H. did, pursuant to the said notice, attend to inspect the said documents, but refused to consent to admit the same, as required by the said notice."

[*An affidavit of service of the rule Nisi must be added.*]

(v) See form of order in *Smith v. Bird*, 3, Dowl. P. C. 645.

(w) See form of order, *Id.* 646.

(x) S. 4. The three first sections of this Act relate to the examination of witnesses, under a writ of *mandamus*, in places in foreign parts, under the King's dominion, the power to grant which writ, is confined to the Courts at Westminster. See Chapman's *Pr. K. B.* (2 Ed.) 238.

Durham, and the several Judges thereof, may, on the application of any party to a suit, depending in any of such Courts, order the examination on oath, upon Interrogatories, or otherwise, of any witnesses within the jurisdiction of the Court; or may order a commission to issue for the examination of witnesses on oath, at any place out of the jurisdiction, by Interrogatories, or otherwise; and may likewise order the attendance of witnesses, and production of documents, in such manner, on such terms, and under such limitations, as are mentioned in the act (y).

The statute 3 and 4, W. IV., c. 42, renders admissible Statute 3 & 4, the evidence of witnesses interested solely on account of W. 4, c. 42. the verdict (z); and provides a mode of compelling the attendance of witnesses before Arbitrators (a).

(y) For the mode of proceeding under this Act—see Tidd's Pr. [1833] pp. 161 & seq., and Chapman's pr. K.B. (3 Ed.) 239. Arch. (by Chitty) 297.

(z) Sect. 26.

(a) Sect. 40.

BOOK 2. CHAP. XIII.

OF THE JURY AND JURY PROCESS—SPECIAL JURIES—AND
VIEWS.

SECT. 1.

OF THE JURY AND JURY PROCESS.

Summoning and
return of jurors.

The nominating, summoning, and return of jurors, as well as their qualification, disqualification, and other matters relating to them, are regulated by statute 6, Geo. IV., c. 50 (a), which contains the following provisions, peculiarly relating to juries for the trial of causes in the *Courts of the Counties palatine*. By section 17, it is enacted, that every Sheriff, or other Minister, to whom the return of juries for the trial of causes in those Courts may belong, shall, *ten* days at least, before the said Courts shall respectively be held, summon a competent number of men named in the jurors' book, to serve on juries in the said Courts, so as such number be not less than 48, nor more than 72, without the direction of the Judge or Judges of such Courts: and shall return a list, containing the names alphabetically arranged, and the places of abode, and additions, of the jurors, so summoned, on the first day of the Court to be held for the said Counties palatine respectively: and the jurors so summoned, or a competent number of them, as the Judge or Judges of such Courts respectively shall direct, and no others, (unless in cases where a special jury shall be struck), shall be named in every panel, to be annexed to every writ, of *venire facias juratores*, *habeas corpora juratorum*, and *distringas*, which shall be issued out and returnable for the trial of causes in such Courts respectively.

(a) See the Act; and see Arch. Pr. (by Chitty), pa. 306 & seq. 348 & seq. see also Tidd's Pr. (9th Ed.) pa. 777 & seq. & 851 & seq.

By section 19, the Sheriff is required to make out a list of all the jurors summoned, and to keep such list, in the office of his undersheriff, for *seven* days, before the sitting of the next Court, to be holden for the County palatine; and the parties in all causes to be tried at such Court, and their respective attorneys, shall have liberty to inspect such list, without any fee.

Jury Panel to be kept in the Sheriff's office for *seven* days before the assizes; and to be inspected without fee.

And by section 22, the Judges are authorized to direct the Sheriff, to summon and impanel such number of jurors, not exceeding 144, as they may think fit, to serve indiscriminately on the criminal and civil side; such Jurors to be divided into two sets, the first set to serve for so many days, at the beginning of each assize, as the Judges shall, within a reasonable time before the commencement of such assize, think fit to direct; and the other set, to serve for the residue of such assize.

The Judges may direct two sets of Jurors to be summoned, to serve indiscriminately on the civil and criminal side.

When the assizes for this County were held exclusively at Lancaster, the last mentioned clause was generally acted upon, and the panel usually contained 120 names, being divided into two sets, of 60 each; the first set attending the first week of the assizes, and the second set during the remainder of the assizes.

But by the order of his present Majesty, for holding the assizes at Liverpool, as well as Lancaster, it is provided, "that the Sheriff, or other Minister, to whom belongs the return of the jurors, for the trial of issues, to be tried at the said assizes at Lancaster or Liverpool, either from the superior Courts at Westminster, or in the Court of Common Pleas at Lancaster, or any criminal issue, shall summon a competent number of men named in the jurors' book, to serve on juries indiscriminately on the civil and criminal side, at the said assizes at Lancaster, so as such number be not less than 48, nor more than 72: and also a competent number of the like persons to serve on juries, indiscriminately as aforesaid, at the said assizes at Liverpool, so as such number be not less than 48, nor more than 72, unless a Judge, or the Judges in the commission of oyer and terminer and gaol delivery shall direct a greater or less number; in which

Order of the King relating to the summoning, &c. of Jurors, for the Lancaster and Liverpool assizes.

"case such greater or less number, shall be summoned :
 "and in summoning such jurors to attend at the said assizes
 "at Lancaster and Liverpool respectively, the said Sheriff,
 "or other Minister, shall have regard to the convenience
 "of the said jurors, as to their place of residence." The
 order also directs, that the jurors who shall have so served,
 shall have the like privilege and exemption, by virtue of the
 jury act, 6, Geo. IV., c. 50, as if they had served at the
 Assizes held for the whole County ; and the provisions of
 that Act are to be in force with respect to each of the said
 assizes, to be held at Lancaster and Liverpool respectively,
 so far as they may be applicable thereto, in like manner as
 they were, with respect to the assizes, held at Lancaster
 only.

Applying to get
 Jurors excused
 from attendance

As attorneys are frequently employed to get jurors excused from attending at the assizes, the following hints may be useful :—The jurors are summoned about a fortnight before the assizes, and the Sheriff summons more than are requisite, calculating upon there being (as there always are) numerous claims of exemption, and excuses. It is entirely discretionary with the undersheriff to allow such claims, or not, as the statute justifies the Sheriff in impannelling any person whose name appears in the jurors' book : but where the claim is reasonable, it is usually allowed. The application, however, should be made as soon as possible after the party is summoned, for when the panel is made up, (which, we have seen, must be done, *seven* days at least previous to the assizes), the undersheriff cannot dispense with the attendance of any person, whose name appears in it ; and after that period any grounds of exemption, or excuses for non-attendance, can only be made available on application to the Court, by affidavit, at the assizes. A person claiming *permanent* exemption, should apply at the Petty Sessions, held in the month of September, to have his name struck out of the jurors' list (*b*).

Jury process.

The jury process for the trial of causes, in this Court, at the assizes, are the writs of *venire facias iuratores*, and

(*b*) See stat. 6, Geo. 4, c. 50, s. 9-10.

habeas corpora juratorum; forms of which are subjoined (c).

When the assizes were held at Lancaster only, these writs were issued from the Prothonotary's office there, (the business of the public offices being, as we have seen, then transacted at Lancaster during the assizes), and the order

(c) *Writ of VENIRE FACIAS JURATORES with variations where a defendant has suffered judgment by default; and where the cause is brought to trial by proviso*—For other variations see Tidd's Prac. forms pa. 281 & seq & Chitty's forms to Arch. Pr. 150 & seq.

William the fourth by the Grace of God of the United Kingdom of Great Britain and Ireland, King, defender of the Faith to the Sheriff [or Coroners, &c.] of Lancashire greeting: We command you that you cause to come before our Justices of our Court of Common Pleas for our County Palatine of Lancaster, at Lancaster, [or "Liverpool"] on the next General Session of Assizes, there to be holden, twelve good and lawful men of the body of your County, qualified according to law, by whom the truth of the matter may be better known, and who neither to A. B., Plaintiff, nor to C. D. and E. F. Defendants, are any way related, to make a Jury of the Country between the parties aforesaid, in an action on promises, [or as the case may be]. [If E. F. has suffered judgment by default, here introduce the following words, instead of the words "in an action on promises" viz: "As well to try the issue joined between the said A. B. and C. D. in an action on promises, [or as the case may be], as to inquire against the said E. F. what damages the said A. B. hath sustained as well by reason of the not performing of the said promises of the said E. F., [or as the case may be] as for his costs and charges by him about his suit in this behalf expended, wherefore it is considered that the said A. B. ought to recover his damages against the said E. F." because as well the said C. D. as the said A. B., between whom the contention thereupon is, have put themselves upon the Jury, and have you there the names of the Jurors and this writ; [If the cause be brought to trial by proviso, here insert the following clause. "Provided always, that if two writs shall come to you in this behalf, then do you execute and return one of them only."] Witness [the chief Justice] at Lancaster, the [day before the first day of the Lancaster or Liverpool Assizes, or if they begin on a Monday, on the Saturday preceding], in the year of our Reign.

G. H., Attorney. Roll [20] [Aug.] Assizes, [6 W. 4.] Clarendon.

Writ of Habeas Corpora Juratorum.

William the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, to the Sheriff [or Coroners, &c.] of Lancashire Greeting: We command you that you have before our Justices of our Court of Common Pleas for our County Palatine of Lancaster, at Lancaster, [or Liverpool] on [the day of the week, being the second day of the Assizes, or if that be Sunday, then the day following] next to come in this same Session of Assizes here holden, the bodies of the several persons named in the panel to this writ annexed, Jurors summoned into our Court before our said Justices, between A. B. Plaintiff, and C. D. and E. F. Defendants in an action on promises, [or as the case

Jury process. of issuing such process, was determined by a ballot, which took place immediately after the opening of the commission, on the evening of the first day of the assizes : but as the assizes are now held at Liverpool, as well as Lancaster, and the public offices are not removed to the assize town as heretofore, the former practice is altered ; and the jury process is issued at Preston, at the following times, viz :—in causes to be tried at Lancaster, on the *morning* of the first commission day of the assizes ; and, in causes for trial at Liverpool, on the *morning* of the first day of the assizes there holden : the priority of issuing the process, being determined by ballot, as formerly.

Mode of issuing The above writs are procured in blank, at the Prothonotary's office, and filled up by the parties : both writs are sued out together, by the Plaintiff, or (if the trial be by proviso) by the Defendant ; and are signed by the Prothonotary, afterwards sealed, then returned, with jury panels annexed, and left with the marshal, on entering the cause.

Teste and return. The *venire facias* is required by the statute 4 and 5, W. IV. c. 62, s. 33, to be dated on the day next preceding the "first commission day of the assizes, unless such commission day shall be on a Monday, and then on the Saturday preceding ;" and is returnable on such commission day. The *habeas corpora*, is also, by the same section, required to be dated "on the day of the return of the *venire facias*," and is returnable on the second day of the assizes ; or if that be Sunday, then on the day following. Since the assizes have been holden at Liverpool as well as Lancaster, it has been the practice to date the *Venire* for the trial of causes at Liverpool, on the day preceding the first day of the assizes there ; and the *Habeas Corpora* on such first day.

Direction. The writs are directed to the Sheriff, or (if he be a party to, or interested in, the cause), to the Coroners, or (if they be also interested), to Elisors.

may be), to make that Jury,* and have you there this writ. Witness [the chief Justice] at Lancaster, [or Liverpool,] the day of [the first day of the present Assizes], in the year of our Reign. G. H., Attorney. Roll [20] [Aug.] Assizes, [6 W. 4.] Clarendon.
 Note.—The Sheriff's return to each of the above writs is as follows :—
 "The execution of this writ appears in a certain panel hereunto annexed."
 "A. B., Esquire, Sheriff."

SECT. 2.—OF SPECIAL JURIES.

The Justices of this Court were empowered, by statute 6, Geo. II., c. 37, s. 2, to appoint special juries; but this Act has been repealed, by 6, Geo. IV., c. 50, the provisions whereof, as far as they relate to special juries, extend, as well to the Courts of the Counties palatine, as to those at Westminster: the Judges whereof, respectively, are authorized to order and appoint, a special jury to be struck in such manner, as the said Courts respectively have usually ordered the same (*d*).

Power given to the Court to order a Special Jury.

Formerly, the mode of obtaining a Special Jury in this Court, was to apply, upon a motion paper signed by counsel, to a Judge at chambers, who granted an order, upon which the Prothonotary made out a Rule (*e*): but since the general Rule of Mar. Ass. 57 Geo. 3, which empowered the Prothonotary, at his discretion, to issue a rule absolute in the first instance, for a Special Jury (*f*), the practice has been, for either party to obtain such rule, without any affidavit, and without notice of the application to the other party (*g*). One copy of the rule is served upon the opposite party, and another upon the undersheriff; and at the time appointed for striking the jury, the undersheriff attends the Prothonotary, with the jurors' book, and "the

Mode of obtaining a Special Jury.

(*d*) Sect. 30. See also Sect. 31 as to the qualification of Special Jurors; and Sect. 32-33, as to nominating them, &c.; see further on the subject of Special Juries, Tidd's Pr. [9th Ed.] 787, and Arch. [by Chitty] 309.

(*e*) Evans' Pr. 79.

(*f*) *Rule for a Special Jury.*

Clarendon Assizes William the Fourth.

A. B. } The day of 183 . Upon application of the Plaintiff's
v. } Attorney for a Special Jury in this cause. It is ordered by the
C. D. } Court, that the Sheriff of the County Palatine of Lancaster, do attend the Prothonotary of this Court or his Deputy, to-morrow, at three o'clock in the afternoon, with the Jurors' book and Special Jurors' list for the said County, who shall name thereout forty eight Jurors, twelve of whom are to be struck out by the Plaintiff, or his Attorney, or in default thereof, by the said Prothonotary, or his Deputy; and other twelve by the said Defendant or his Attorney, or in default thereof, by the said Prothonotary or his Deputy; and that the remaining twenty-four be returned by the Sheriff for the trial of this cause. By the Court.

(*g*) See Massey v. Johnson, 12 East. 69, (note a); but see the Stat. 6 Geo. 2, c. 37, s. 2, and 6 Geo. 4, c. 50, s. 30.

special jurors' list (g).'' The names of 48 jurors, are struck in the manner pointed out by the statute (h); and the Prothonotary afterwards makes out, for each party, a list of the 48, with their places of abode, and additions. An appointment is then made out, and served on the opposite attorney, or agent, for reducing the list to twenty-four; which is done by each party striking out 12, the Plaintiff commencing by striking out one, then the Defendant one, and so alternately. If either party be absent, the Prothonotary strikes out 12 for him. A copy of such reduced list is delivered to each party; and another to the undersheriff, who summons the remaining 24; and this he is required by the Act (i) to do, *three* days at least before the day of attendance on the trial. The Sheriff's fee for summoning the special jury, is three pounds; and he is not allowed any thing *extra*, by reason of the jurors residing at a distance from each other (j).

Special Jury
process.

The Jury process is issued, tested and returnable, as in other cases; and may be had in blank, from the Prothonotary. If the party entering the cause, be not the party who has obtained the special Jury, the practice is for the former to issue common Jury process, and for the latter to sue out the special Jury writ, unless it be otherwise arranged between them.

Tales.

The cause is marked in the paper as a special jury cause; and the Court, on application, will fix a day for the trial. If on the trial less than twelve of the special jurors attend, a *tales* is usually prayed; and the jury is made up from the common jury panel; or, if not a sufficient number, then from other able men of the County, present, and duly qualified (k); but if neither party prays a *tales*, the cause is made a *remanet*; and the same jury must be summoned for the following assizes (l).

(g) The "Special Jurors' list" is a *separate* list required by 6 Geo. 4, c. 50, s. 31. It is extracted from the general list of Jurors, and consists of *Esquires*, or persons of a higher degree, *Bankers*, and *Merchants*.

(h) 6 Geo. 4, c. 50, s. 32.

(i) Id. s. 25.

(j) *Lane v. Sewell*, 1 Chitt. Rep. 175.

(k) Stat. 6 Geo. 4. c. 50, s. 37.

(l) *Evans' Pr.* 80.

The party who shall apply for a special jury, shall "pay ^{Costs of Special Jury.} the fees for striking such jury, and all the expenses occasioned by the trial of the cause, by the same; and shall not have any further or other allowance for the same upon taxation of costs, than such party would be entitled unto in case the cause had been tried by a common jury, unless the Judge, before whom the cause is tried, shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury (m)." The above section mentioning a certificate after verdict only, and not applying to the case of a nonsuit, has been extended by a subsequent Act (n) to the latter case. Where a special jury cause is referred without any provision being made by the parties, as to the costs of the special jury, such costs cannot be allowed, on taxation; and therefore, it is advisable in these cases, to provide, by consent of the parties, that the arbitrator shall have power to award such costs (o). A certificate for costs of a special jury, cannot be granted the day after the trial (p): nor will the Judge certify, on a mere question of law (q): nor in an action of libel, if the plea be the general issue only (r).

The allowance to each special juror, is in the discretion of the Judge, who tries the cause: it is not, however, to exceed one guinea, unless a view has been directed, and had by such juror (s). ^{Allowance to special Jurors.}

SECT. 3.—OF VIEWS.

The Courts of the Counties palatine, as well as those at Westminster, or any Judge of such Courts respectively, may order a rule for a view, containing the usual terms, and requiring (if the Court, or Judge think fit), the party ^{Court or Judge empowered to order a view.}

(m) 6 Geo. 4. c. 50, s. 34.

(n) 3 & 4 W. 4. c. 42, s. 35.

(o) Rex v. Moate, 3 B. & Adol. 237.

(p) Waggett v. Shaw, 3 Camp. 316.

(q) Wemys v. Greenwood, & an. 2 Car. & P. 483.

(r) Roberts v. Brown, 6 Car. & P. 757.

(s) 6 Geo. 4. c. 50, s. 35.

applying for the view, to deposit, in the hands of the undersheriff, a sum of money (to be named in the rule), for payment of the expenses of the view (*t*): and by a late rule of this Court (*u*), after reciting that part of the above section which provides for such deposit, it is ordered, "that upon every application for a view, there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof, from the office of the undersheriff; that the sum to be deposited shall be ten pounds, in case of a common jury, and sixteen pounds, in case of a special jury, if such distance do not exceed five miles; and fifteen pounds, in case of a common jury, and twenty-one pounds, in case of a special jury, if it be above five miles: and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view: and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney, to the undersheriff. And the undersheriff shall pay and account for the money so deposited, according to the scale subjoined (*v*)."

Mode of obtaining a view

The same course was formerly pursued to obtain a view, as a Special Jury, viz: by procuring a Judge's order,

(*t*) 6 Geo. 4. c. 50, s. 23.

(*u*) Reg. Gen. (25) Mar. Ass. 5 W. 4.

	£.	s.	d.
(<i>v</i>) For travelling expenses to the Undersheriff, the shewers and Jurymen, each per mile	0	1	0
Fee to the Undersheriff where the distance does not exceed five miles from his office.....	1	1	0
Where such distance exceeds five miles	2	2	0
And in case he shall be necessarily absent more than one day then for each day after the first, a further fee of.....	1	1	0
[Fee to each of the shewers, the same as to the Undersheriff, calculating the distance from their respective places of abode]...			
Fee to each Common Jurymen per diem	0	10	6
Fee to each Special Jurymen per diem.....	1	1	0
Allowance for refreshment to the Undersheriff, the Shewers, and Jurymen, whether Common or Special, each per diem	0	5	0
To the Bailiff for summoning each Jurymen, whose residence is not more than five miles from the Office of the Undersheriff..	0	2	6
And for each, whose residence does exceed five miles of such distance.....	0	5	0

upon a motion paper, signed by counsel (*w*); but since the general rule of Court of Mar. Ass. 57 Geo. 3, which authorized the Prothonotary, at his discretion, to issue a rule absolute in the first instance, for a view, the practice has been to obtain such rule (*x*) from him (*y*) of course, on the party applying for it, consenting to the conditions usually inserted in the rule, and which will appear from the form subjoined (*x*). In addition to the affidavit required by the general rule of Mar. Ass. 5 W. 4, the Prothonotary now requires an affidavit shewing the necessity for the view. As the names of both shewers must be inserted in the rule, an application must be made to the opposite party, for the name of his shewer; and if he will not name one, an appointment should be obtained from the Prothonotary, who, in case of non-attendance, will

(*w*) Evans' Pr. 78.

(*x*)

Rule for a View.

Clarendon. Assizes William the Fourth.
 A. B. } The day of 1835, On application of the *Plaintiff*. It
 v. } shall be ordered by the Court, that a view of the place in question,
 C. D. } shall be had by six or more of the Jurors to be impanelled and
 returned to try the Issue [or Issues] between the parties, (who shall be
 mutually consented to by the said parties or their Agents), at the place in
 question, before the time of the trial of the said Issue [or Issues], to wit
 on the day of instant, at o'clock in the which said
 Jurors shall meet at [mention the place] and that Mr. [the name and
 addition of the *Plaintiff's shewer*] on the part of the *Plaintiff*; and Mr.
 [the name and addition of *Defendant's shewer*] on the part of the *Defendant*
 shall attend the same day, and shew the matters in question to the said
 six or more of the said Jurors, who shall be consented to as aforesaid: and
 no evidence shall be given on either side, at the time of taking thereof.
 And it is further ordered, that the *Plaintiff's* attorney, or agent, shall de-
 posit in the hands of the undersheriff of the said County, the sum of £
 for payment of the expenses of the same view, pursuant to the statute, 6,
 Geo. IV., chap. 50, sect. 23; and if such sum shall be more than suffi-
 cient to pay the expenses of the said view, the surplus shall forthwith be
 returned to the *Plaintiff's* attorney, or agent; and if such sum shall not
 be sufficient to pay such expenses, the deficiency shall be forthwith paid
 by the said *Plaintiff's* attorney, to the said undersheriff, the *Plaintiff* * hereby
 consenting, that in case no view shall be had, or if a view shall be had,
 by any of the said Jurors, whether they shall happen to be six, or any
 particular number of the Jurors, who shall be so mutually consented to as
 aforesaid, yet, the said trial shall proceed, and no objection shall be made
 on either side, on account thereof, or for want of a proper return to the
 writ of *venire facias* or *habeas corpora juratorum*, to be issued in this
 cause.
 By the Court.

* The party taking out the rule, see 1 Sell. 446. 1 Burr. 257-8.

(*y*) But see stat. 6 Geo. 4, c. 50, s. 23

name one *exparte*. The time and place of meeting to proceed on the view, must also be mentioned in the rule, and should be previously arranged with the undersheriff—one copy of the rule must be served on the opposite attorney, or agent; and another left with the undersheriff, together with the money required to be deposited, and the names of the jury, if special. If it be a common jury, the Sheriff will nominate such persons to take the view, as the parties may mutually select, from the jury panel; or if they will not select, then such as he thinks proper.

Jury process
in case of a view.

The jury process, is made out, and issued as in other cases; and although it has not been usual in this Court to make any variation in the form of such process in the case of a view, yet it would seem, from the statute 6, (Geo. IV., c. 50, s. 23, that the process ought to be special; and in the Prothonotary's precedent book of writs, there is the form of a special writ of *habeas corpora* for that purpose, as below (z). It will be seen, however, that by the terms of the rule for a view, no objection is to be taken for want of a proper return to the jury process.

Costs of the
view.

The party applying for the view, if successful in the suit, is entitled to the costs of the view, as costs in the cause; and should be prepared, on the taxation, to shew the particulars of the expenses—for instance, how many viewers there were—how far they, the shewers, and the undersheriff, travelled to the view—and how long they were absent, &c., to enable the Prothonotary to fix the proper allowance (a).

(z) *Writ of Habeas Corpora Juratorum, where a view is directed.*

[As the form of the *Habeas Corpora ante pa.* 161-2, to the Asterisk, then add] "We also command you that you have six or more of the Jurors named in the said panel, to view the place in question upon the day of instant, on the shewing of of on behalf of the said plaintiff and of on behalf of the said defendant, and that you certify by a special return of this writ, that a view hath been had according to the command of the said writ, and have you there this writ. Witness &c." [See ante *pa.* 162]

The Sheriff's return to the above writ is as follows:—"By virtue of this writ to me directed, I have caused a view to be made, as it is within commanded me. The rest of the execution appears in a certain panel hereto annexed." "A. B. Esquire, Sheriff."

(a) See Chapman's Pr. K. B. [2nd Ed.] 272-3.

BOOK 2. CHAP. XIV.

OF ENTERING THE CAUSE FOR TRIAL—MARKING THE
DEFENCE—AND OTHER MATTERS INCIDENTAL TO
THE TRIAL.

Causes for trial at the *assizes*, are entered with the Judge's Entry with the marshal; those for the *Northern Division*, are entered at ^{Marshal.} *Lancaster*; and those for the *Southern Division*, at *Liverpool*; and the attorney or agent entering the same, must deliver to the marshal, the pleadings in paper (a), together with the jury process, and copies of the particulars, of demand, and set-off (if any).

By rule of Court, of August assizes, 3, Geo. IV., it was Cause lists. ordered, that all causes as well in this Court, as by *Mittimus* from any other Court, to be entered for trial, hearing, or argument, or for assessing damages on writs of inquiry, (b), should be entered in three lists;—the *first* to contain all causes wherein the official residence of the Plaintiff's attorneys (c), (or of the Plaintiffs themselves, when suing in person), should be in any of the Hundreds of *Amounderness, Lonsdale, Blackburn, or Leyland*; the *second* where such residence should be in the Hundred of *Salford*; and the *third*, where such residence should be in the Hundred of *West Derby, or elsewhere*.

(a) Reg. Gén. Mar. Ass: 51 Geo. 3.

(b) The writ of Inquiry of damages upon a suggestion of breaches, in an action on bond, or penal sum, for non-performance of any covenant or agreement contained in any indenture, deed, or writing, and which was formerly required by stat. 8 & 9, W. 3, c. 11, s. 8, to be executed before the Justices of Assize, must now be executed before the Sheriff, unless otherwise ordered. See stat. 4 & 5, W. 4, c. 62, s. 18; and post B. 3, c. 2.s.2.

(c) This has been considered, in practice, to mean the attorney properly concerned, and not his agent, though the latter may appear on the proceedings, as the attorney.

Alteration in the cause lists, by the holding of the assizes at Liverpool as well as Lancaster.

But the above rule, (so far as it directs the entry in the several lists to be according to the residence of the Plaintiff's attorney, or of the Plaintiff when suing in person,) is partially altered by the order of the King, touching the holding of the assizes at Liverpool, as well as Lancaster, which order, we have seen (*d*), directs that where there are no words in the margin of the declaration, specifying the division of the county, the issue shall, unless otherwise ordered, be tried at Lancaster: and that all *local* actions shall, if not directed to the contrary, be tried either at Lancaster, or Liverpool, as the cause of action shall have arisen in the Northern or Southern Division of the county: and that in such actions, the words "Northern Division," or "Southern Division," must be inserted in the margin of the declaration. With regard, however, to causes for trial Liverpool, the above rule is, in other respects, still acted upon; there being two lists, of causes for trial there, one for the hundred of Salford, and the other for the hundred of West Derby, (including places out of the County); the entry in the one list or the other depending, as formerly, upon the residence of the attorney, or party, entering the same.

Consequence of an entry in the wrong list.

Where a cause was entered by mistake, in the wrong list, and tried as undefended, the Defendant's attorney having searched the right list without finding it, the Court granted a new trial, holding that the attorney was not bound to search the other list (*e*).

Time of entry.

It is further ordered, by the rule of August assizes, 3, Geo. IV., that "no cause shall be entered in any of the said cause lists, after twelve o'clock on the second day of the assizes, (exclusive of Sunday); nor any cause withdrawn and re-entered, without leave of this Court, or one of the Judges thereof."

Time for marking a defence.

As to the time for marking causes defended, the same rule directs that "the attorney, or agent, intending to defend or contest a cause, shall mark the same in the cause paper, with the name of such attorney, at, or before the several times hereinafter mentioned, that is

(*d*) Ante pa. 38.

(*e*) Hunter v. Hornblower, 3 Dowl. P. C. 491.

"to say—in the first list, on or before the first day of the assizes, (exclusive of the commission day, and Sunday) : and in the second and third lists, on or before the second day of the assizes, (exclusive, as aforesaid), otherwise every such cause shall be called on as undefended or uncontested at the times after-mentioned (f)."

In order to give parties in the several Hundreds, alternately, the advantage of a trial at an early period of the assizes, it was ordered, by rule of September assizes, 5, Geo. IV., that the several cause lists should be thereafter called on, in the following successive course and rotation, viz. :—At the then next assizes, first, the West Derby list—secondly, the Lonsdale list—thirdly, the Salford list : at the second assizes ; first, the Salford list—secondly, the West Derby list—and thirdly, the Lonsdale list : And at the third assizes ; first, the Lonsdale list—secondly, the Salford list—and thirdly, the West Derby list ; and so to proceed at every future session of assizes, in a like repeated course and rotation. But the above rule, having been made before the assizes were held at Liverpool, is, in some degree, unsuitable at present : so far however as it is applicable to the trial of causes at Liverpool, it is still acted upon. Thus, at the August assizes, 1835, the West Derby list was taken before that for Salford ; and at the March assizes, 1836, the Salford list preceded the one for West Derby.

The order in which cause lists are taken.

Special jury causes are appointed to be taken on particular days, and the time is generally fixed, on the application of Counsel : and all other causes, unless specially appointed by the Court, are called on in the order in which they are entered, in each of the said lists respectively, commencing with the first (g).

Special jury causes.

Common jury causes.

When a cause has been made a *remanet*, it must be entered anew, in the cause paper ; and the practice is, to take the *remanets* before any other cause.

(f) See post pa. 172.

(g) Reg. Gen. Aug. Ass. 3 Geo. 4.

Undefended causes.

If the cause be not marked defended, at the time prescribed for that purpose (*h*) ; it is provided by the rule of August assizes, 3 Geo. IV., that it shall "be called on, as "an undefended or uncontested cause, at the several "times hereinafter mentioned, that is to say—in the first "list, (unless previously disposed of in regular order), at "the sitting of the Court on the second day of the assizes, (exclusive of the commission day, and of Sunday) : "and in the second and third lists, at the commencement "of those lists." The first day of the Liverpool assizes, is considered as the commission day there, for the purposes of this rule.

Consequence of taking a cause out of order.

A cause should not be taken as undefended, out of order, unless the Plaintiff is perfectly satisfied, by notice, or otherwise, that it will not be defended : and where a cause which stood 30 off, was so taken, in the absence of the Defendant's attorney, the Court granted a new trial—observing that where there is a list for the day, as in London, every body is expected to be ready ; but that cannot apply to the assizes, where there is a list of 80, or 100 causes ; and that it would be very hard if all parties were obliged to be prepared on the first day (*i*).

Consequence of parties not being ready when called upon.

"In case the attorney who shall have entered any *undefended* or *uncontested* cause, shall not be prepared with "his witnesses, to proceed to trial, at the respective times "above mentioned, then the same may be called on at any "time afterwards, before the time when the same shall be "peremptorily called on, in the order in which the same "shall stand in the said several cause papers, respectively ; "but such costs only shall be allowed, on taxation, as if the "same had been tried, at the several and respective times, "above appointed for undefended causes respectively : and "all allowances for the attendance of any attorney, or "witness, in any cause, shall be made with reference to "the arrangement and progress of the business of the "assizes, in pursuance of this rule ; and proper directions "to give effect to this rule shall be marked upon the "panel, as a guide to the proper officers, on the taxation

(*h*) See ante pa. 170-1.

(*i*) *Per* Lyndhurst C. B. in *Aust. v. Fenwick*, 2 Dowl. P. C. 246.

"of costs (j)."^j If the Plaintiff's attorney be not ready when the cause is peremptorily called on, in order, it will be struck out of the list, if undefended; or if defended, the Defendant may insist upon a nonsuit (k), unless the Plaintiff, (if he entered the cause), withdraw the record; which, however, cannot be withdrawn, in the absence of the attorney, by counsel who has merely a retainer in the cause (l). An excuse for the absence of the attorney is seldom admitted, unless such absence is occasioned by sudden illness, or accident, in which case, the Court will sometimes permit the trial to be postponed.

It is unnecessary to offer a detail of the proceedings on ^{The trial.} the trial, there being nothing peculiar in the practice of this Court, in that respect: and it has already been noticed, that actions in this Court are tried at *bar*, and that the Judges cannot be assisted in the trial of civil causes, by a serjeant, as in other counties (m). We have also seen (n), that it is the business of the Prothonotary to call over the jury (o), to read the documentary evidence, and to record the verdict.

It may be observed, however, that it has now become a ^{The verdict.} matter of some importance, as affecting the costs, for parties to see that the verdict is properly entered, especially where there are several issues: and it has been held, that where there are several counts on the same cause of action, and one cause of action only has been proved, the Defendant may, at the conclusion of the trial, but not before, call upon the Plaintiff to elect upon which count he will enter the verdict; for he is not entitled to enter it on all; and a bill of exceptions, it seems, will lie, if the Judge directs the verdict, in such case, to be entered, on all the counts (p). As to

(j) Reg. Gen. Aug. Ass. 3 Geo. 4.

(k) *Ahitbol v. Benedetto*, 3 Taunt. 225.

(l) *Doe dem. Crake v. Brown*, 5 Car. & P. 315.

(m) *Ante* pa. 18.

(n) *Ante* pa. 20.

(o) As to the mode of calling over the Jury, see stat. 6, Geo. 4, c. 50, s. 26: which section also provides that the same Jury may try several causes. Where a view has been had, the *viewers* must be first called; *Id.* sec. 24. *Special Jurors* are called over from the Panel.

(p) *Ward v. Bell*, 2 Dowl. P. C. 76. 1 Cr. & M. 848, S. C. *Swinburn v. Jones*, 1 Moody & R. 322.

amendments on the trial, in cases of *variance*—see statute 9, Geo. IV., c. 15; & 3 & 4, W. IV., c. 42, s. 23 & 24.

Taking Costs
and issuing Ex-
ecution.

It was formerly the practice, unless a rule was obtained for a new trial, or in arrest of judgment, that the costs might be taxed, and an execution issued, on the fifth day of the assizes (Sunday excluded), at which the cause was tried; or if tried on the fifth day, then immediately after the trial; but it is ordered by rule of Court (q), that “no execution issue in any cause depending or to be depending in this Court, and entered for trial in any of the cause lists, until the day next after the assizes shall have ended, (Sundays excluded),” unless the Judge, before whom such action may be tried, shall otherwise direct (r). This rule, however, does not apply to the case of a *cognovit*, given in a cause entered for trial, in which case an execution may be issued, of course, at any time during the assizes: and an execution, in an action of debt, may be issued during the assizes, if, after the cause is entered, the parties agree to withdraw the plea. And it seems that an execution may be issued in a cause tried at Lancaster, after the assizes *there*, though during the assizes at Liverpool.

(q) Reg. Gen. Sep. Ass. 2, Geo. 4.

(r) Reg. Gen. [5] Mar. Ass. 4, W. 4.

BOOK 3.

OF PROCEEDINGS UPON JUDGMENTS BY DEFAULT,—
AFTER WARRANT OF ATTORNEY—AND COGNOVIT.

CHAP. I.

OF JUDGMENT BY DEFAULT.

If the Defendant do not plead within the time allowed for that purpose (a), the Plaintiff may sign judgment (b) : In what cases judgment by default may be signed. and although a plea in *bar* may be filed at any time before judgment is actually signed ; yet as we have seen (c), if a plea in *abatement* be filed after the expiration of the time for pleading, judgment may be signed. We have also seen that judgment may be signed, when the Defendant has pleaded such a defective or informal plea, as may be treated as a nullity ; though in such case, the Plaintiff must wait until the time for pleading has expired (d). If the Defendant neglect to rejoin, rebut, &c., at the proper time (e), this is considered an abandonment of the plea ; and the Plaintiff, in such case, may strike out all the previous pleadings, and sign judgment, as for want of plea (f).

But “ no judgment shall be signed for want of any declaration, plea, replication, rejoinder, or other pleading, unless, or until a demand of such declaration, or other pleading, shall have been previously made, from the attorney, or agent, on the other side, (in case there Demand of plea, in what cases to be made.

(a) See ante pa. 123 and seq.

(b) Reg. Gen. [2] Aug. Ass. 2, W. 4. As to the time for signing judgment in ejectment, see post B. 4, Ch. 1 ; in Replevin, see post B. 4, Ch. 2 ; and after a frivolous demurrer, or for want of the proper statement in the margin of a demurrer—see ante pa. 135.

(c) Ante pa. 123.

(d) See ante pa. 129—see also Tidd's Pr. [9th Ed.,] 563-4. 1 Arch. (by Chitty) 242 and seq.

(e) See ante pa. 131.

(f) Petrie v. Fitzroy, 5, T. R. 152.

"shall be any such attorney, or agent), such demand not "to be made till the time for filing such declaration, or "other pleading, is expired; and for which demand, no "fee shall be charged, or allowed(g)." This rule does not expressly require that the Defendant's attorney shall have appeared, or filed bail, to render it necessary to demand from him a plea; and although, by the practice of the Courts at Westminster, a demand of plea is not necessary, where the Plaintiff has appeared for the Defendant according to the statute (h), yet, it is usual in this Court, to make such demand, from an attorney who has given notice that he is concerned as such, in the Cause, notwithstanding he may not have done any act in Court. The case of a party appearing in person, though not within the express terms of the rule, is yet within the spirit of it, and in such case, it is also the practice, to make a demand.

When a demand of plea is not necessary.

It is not necessary, however, to demand a plea from a Defendant, who has neither appeared, nor employed an attorney; nor where the Defendant is bound by rule, or a Judge's order, to plead within a given time (i); nor, it would seem, where he has filed a plea, which may be treated as a nullity (j): or pleaded in abatement, after the time allowed for that purpose (k). The demand should not be made before bail are perfected, for if so, we have seen, it is a waiver of justification (l).

How, and of whom, the demand must be made.

The demand is usually made in writing; and is necessarily so, in the Court of Common Pleas at Westminster (m). It must be made from the opposite attorney, in case there be an attorney; but when he does not reside at Preston, it must be made from his agent there: and should be made from the Defendant himself, if he has appeared in person, or (if he be an attorney), from his agent at Preston.

(g) Reg. Gen. Mar. Ass. 57, Geo. 3.

(h) *Free v. Mason*, 5, B. & C. 763. *Palk v. Rendle*, 8, T. R. 465. *Davis v. Cooper*, 2, Dowl. P. C. 135.

(i) *Pearson v. Reynolds*, 4, East. 571. *Nias v. Spratley*, 4, B. & C. 386. *Baker v. Hall*, 1, Taunt. 538.

(j) *Bond v. Smart*, 1 Chitt. Rep. 735. *Lockhart & others v. Mackreth* 5, T. R. 661. And see ante pa. 129.

(k) *Brandon v. Payne*, 1, T. R. 689.

(l) Ante pa. 96.

(m) *Nott v. Oldfield*, 1, Wils. 134.

We have seen that the demand must not be made until the time for pleading is expired: but no period is prescribed by rule of this Court, for signing judgment after the demand. It is usual, however, where the demand is made from an agent, to allow him a return of post, to write for the instructions of his principal: but this is considered a mere indulgence, and when the assizes are near at hand, and a trial might be lost, by allowing such time, the practice is, to require the Defendant to plead the same day, or to take out a rule for further time, by which he is bound to go to trial at the following assizes.

Judgment by default is signed, by leaving with the Prothonotary, a written memorandum, containing the names of the parties; the date of signing the Judgment; the number of the entry in the imparlance book; and the names of the attorneys on both sides; or if the Plaintiff has appeared for the Defendant according to the statute, the memorandum must state that fact. The Prothonotary will not sign a Judgment out of the usual office hours; and when the Plaintiff's and Defendant's attorneys are at the office, at the opening in the morning, the one to sign judgment, and the other to plead, the practice is, to take the plea in preference to the judgment.

When the sole object of the action is damages; as in assumpsit, covenant, trespass, trover, case, or replevin, judgment by default is *interlocutory*; in some cases it is *final*, in the first instance, as in actions of debt, and ejectment. But in debt on bond, for the performance of covenants, or the payment of money by instalments, or of an annuity, or the like, although in strictness, the judgment is final, and entered up for the amount of the penalty, yet the Plaintiff cannot issue execution for that amount, but must suggest breaches upon the roll, and execute a writ of Inquiry, in order to ascertain the damages actually sustained (n): and in debt, for foreign money; or under Stat. Edw. VI., for not setting out tithes; or it would seem, for use and occupation, a writ of Inquiry is requisite (o).

(n) Stat. 8 & 9, W. 3, c. 11, s. 8—and see post pa. 187.

(o) Arden v. Connell, 5, B. & Ald. 885.

Costs.

After judgment by default in an action of debt, the costs may be taxed without an appointment (*v*), and it is ordered by a late rule (*q*), that "in all actions of debt on simple contract, and assumpsit, after judgment by default, the Prothonotary shall, on the taxation of costs, allow only for such part of the declaration, as he shall think necessary."

Execution in debt.

Where the judgment is final, execution may, in general, be issued immediately; and "after judgment by default, in an action of debt, on simple contract, the Plaintiff shall, on issuing execution, cause to be filed with the Prothonotary of this Court, or his deputy, an affidavit of the amount due, at the time of making such affidavit; which amount shall be indorsed upon the writ of execution, and which affidavit shall be sworn, within a week, from the issuing of such execution (*r*)."

Setting aside the judgment when irregular.

If the judgment is *irregular*, the application to set it aside, must be made within a reasonable time, and before the party applying has taken a fresh step, after knowledge of the irregularity (*s*); and in general, such irregularity is waived by attending the taxation of costs (*t*).

When regular.

Where the judgment is *regular*, and the Plaintiff has not lost a trial, it will generally be set aside on payment of costs, the Defendant applying promptly, upon an affidavit of merits, and being bound to plead issuably, take short notice of trial, and to such other terms, as the Judge may think reasonable (*u*).

When the judgment is interlocutory, it is necessary to execute an inquiry; or (if the action be on a bill of exchange, or promissory note), to compute the principal and interest thereon, before the Prothonotary; which subjects will be considered in the two next chapters. As to the effect of a judgment by default, and execution thereon, in the case of bankruptcy—see the treatises referred to below (*u*).

(*p*) Unless it be an action of debt, on judgment, wherein a rule for costs has been obtained, in which case, an appointment to tax must be served.

(*q*) Reg. Gen. [63] Mar. Ass. 2, W. 4.

(*r*) Reg. Gen. [62] Mar. Ass. 2, W. 4.

(*s*) Reg. Gen. [20] Mar. Ass. 2, W. 4. See ante pa. 59

(*t*) See 1, Arch. (by Chitty) 586-7, Tidd's Pr. [9th Ed.] 567.

(*u*) Arch. Prac. in Bankr: [5th Ed.] pa. 111-117. Henley's Digest, 1 Ed.] 286. Tidd's Pr. [9th Ed.] 1009.

BOOK 3. CHAP. II.

OF THE WRIT OF INQUIRY IN ORDINARY CASES, AND
UNDER THE STATUTE 8 & 9, W. III. C. 11, s. 8.

SECT. 1.

OF THE WRIT OF INQUIRY IN ORDINARY CASES.

Where it is necessary to execute a writ of Inquiry (a), Notice of Inquiry the Plaintiff may, immediately after signing interlocutory judgment, give notice of such execution (b).

By a late rule of Court (c), it is ordered, that the notice of Inquiry, "shall, in all cases, be four days, exclusive;" but though this rule would seem, to repeal (so far as respects the notice of Inquiry) the former rule of Sep. Ass. 2, Geo. IV., which directs, that "in all cases in which a term's notice is required by the rules and practice of the Court of Common Pleas at Westminster (d), a full exclusive four weeks' notice shall be given in causes depending; or to be depending, in this Court," yet, as a longer notice is proper, where proceedings have been suspended for a year, and as the above rule requiring four days' notice, may be construed to mean, in all common cases only, and to admit of the exception of old causes, it will be prudent still to act upon the rule of Sep. Ass., 2, Geo. IV., and the practice is to do so.

(a) See ante pa. 177. Arch. (by Chitty), 590. Tidd's Pr. [9th Ed.] 573. 1 Sell. 346.

(b) Where a defendant is obliged to accept notice of Inquiry after a joinder in demurrer, see ante pa. 135.

(c) Reg. Gen. [4] Aug. Ass. 2 W. 4.

(d) A Term's notice of Inquiry is necessary in C. P. W. where no proceedings have been had for a year. 1 Sell. Pr. 360.

Where a defendant is under terms of accepting short notice of *trial* he is notwithstanding entitled to full notice of Inquiry (e) : and where the notice is not sufficient, it should be returned, and the Inquisition will be set aside for irregularity (e).

Contents of notice.

The notice (see form below) (f) must state with accuracy, the names of the parties, and the time and place of taking the inquisition : and when the Inquiry is to be executed before a Judge at the assizes, the notice is given for the assizes, generally, as a notice of trial ; but in other cases, it must express the particular time and place of execution ;—as, “ on Wednesday the 25th day of May instant, between the hours of 10 and 12 o'clock, in the forenoon, at the Sheriff's office in street, within Preston, in the County of Lancaster,” or other place, where the inquisition is to be taken. A notice of executing the writ “ at 10 o'clock, or as soon after as the Sheriff can attend ;” or, “ between the hours of 10 and 2 o'clock ” is insufficient, for uncertainty : but a notice to execute the Inquiry “ at 11 o'clock,” has been held to be regular, where it appeared that it was executed before 12 ; and a notice for *Wednesday*, the 11th June, whereas, the 11th fell on a *Thursday*, was held not irregular, so as to set aside the proceedings, the Defendant not making oath that he was misled by it (g). The notice must be signed, dated, and addressed, as a notice of declaration ; and when it is intended to employ Counsel on the Inquiry, notice thereof should be given, otherwise Counsel's fee will not be allowed on taxation ; and if Counsel attend without such

(e) *Stevens v. Pell*, 2 Dowl. P. C. 355. 2 Cr. & M. 421. 4 Tyr. 267, S. C.

(f)

Notice of Inquiry.

In the Common Pleas at Lancaster.

Between A. B. Plaintiff,
and

C. D. Defendant.

Take Notice that a writ of Inquiry of Damages in this cause will be executed at the Sheriff's office in street, within Preston, in the County of Lancaster, on the day of instant, between the hours of and of the clock in the noon of the same day, where and when you may attend, if you think proper. Dated the day of Your's &c.

To Mr. J. K., Defendant's } E. F., attorney for the Plaintiff,
attorney, } [by G. H., his agent.]
[and Mr. L. M., his agent.] }

(g) See Tidd's Pr. [9th Ed.] 579, Arch. [by Chitty], 597. 1 Sell. 352.

notice, the Sheriff, if required, may postpone the inquisition, till the other party has also an opportunity of attending by Counsel (h).

The notice of Inquiry must be given, in the manner before mentioned, respecting notices of declaration (i); that is, in case the Defendant shall have filed special bail, or entered an appearance by attorney, by giving notice to his attorney, and if he do not reside at Preston, then to his agent there: or if an appearance has been entered for the Defendant according to the statute, and no attorney is employed for him, then by leaving the notice with the Defendant, or at his last or most usual place of abode. If there be more Defendants than one, it is usual to give notice to each (j).

How, and on whom notice is to be served.

The notice may be renewed, or countermanded; and any irregularity in it is cured, by the Defendant, or his attorney, making a defence on the inquisition (k).

Countermand notice.

The writ of Inquiry is a judicial writ, directed to the Sheriff; and the nature of it will appear from the form subjoined (l).

The writ of Inquiry.

(h) Elliott v. Nicklin. 5 Price 641.

(i) Reg. Gen. (4) Aug. Ass. 2 W. 4, see ante pa. 121.

(j) But see Figgins v. Ward & ors. 2 Dowl. P. C. 364.

(k) See Arch. (by Chitty), 269, 598, 887.

(l) Writ of Inquiry.

William the Fourth, &c. to the Sheriff of Lancashire greeting:
Whereas A. B., in our Court before our Justices at Lancaster, on the day of in the year of our Lord [the date of the first writ of Summons, or Capias], impleaded C. D. in an action on promises, [or as the case may be]; that whereas the said defendant on the day of [here continue with the declaration to and including the words—"to the Plaintiff's damage of £ "] as it was said; and in such manner in our said Court before our Justices at Lancaster aforesaid, it was proceeded, that the said Plaintiff his damages, by reason of the premises, against the said Defendant, ought to recover, but because it is not known what damages the said Plaintiff hath sustained, We command you, that upon the oath of twelve good and lawful men of your bailiwick, you diligently inquire, what damages the said Plaintiff hath sustained, as well by reason of the premises, as for his costs and charges by him, about his suit, in this behalf expended; and that the Inquisition which you shall take thereupon, you make manifest to our Justices at Lancaster, on the day of next, [any day certain] under your Seal, and the Seals of them by whose oath you shall take the said Inquisition, and have you then and there the said Inquisition and this writ. Witness [the Chief Justice of this Court] at Lancaster, the day of [the day of issuing], in the year of our Reign.

E. F., Attorney.

Clarendon.

Teste & return. The practice relating to the teste and return of this writ, has lately undergone several alterations. It was formerly tested the last day of the preceding assizes; and before the statute 39 and 40, Geo. III., c. 105, could only be made returnable on the first or last day of the assizes: but under that act, it might be made returnable either at the assizes, or on any of the return days in *Easter* and *Michaelmas* terms, as in the Common Pleas at Westminster. A further alteration was made by statute 1, W. IV., c. 7, s. 8, which provided, that in *lieu* of the return days in *Easter* and *Michaelmas* terms, all writs of Inquiry should and might be made returnable, on the first *Wednesday* in every month, in addition to the first and last days of each assizes. But the most important recent improvement, has been made, by the statute 4 and 5, W. IV., c. 62, by which, the Inquiry must bear date on the day of issuing (n); and "shall be made returnable on any day certain to be "named in such writ (o)."

Issuing and lodging.

The writ is made out by the party—signed by the Prothonotary—afterwards sealed, on a docket obtained from the Cursitor—and must be lodged with the undersheriff, a reasonable time before the inquisition, to enable him to summon a jury: when the Inquiry is to be executed at the sitting of the County Court at Liverpool, or Manchester, (as mentioned hereafter) the writ is usually lodged, on the Monday previous to such sitting.

Before whom executed.

The Inquiry is generally executed before the undersheriff, or his deputy; but may, under special circumstances, be executed before a Judge, at the assizes, in which case, however, the Judge has no judicial power, and merely acts as the Sheriff's assistant (p). To procure an inquisition before a Judge, an application must be made, to one of the Judges of this Court, founded upon an affidavit, stating the special grounds; and if the application be granted, the cause is entered with the marshal, in the same manner as an issue; and the writ of Inquiry is left with the Sheriff, who returns the inquisition, as in other cases.

(n) Sect. 33.

(o) Sect. 19.

(p) Bull. N. P. 58. Arch. (by Chitty), 594. Tidd's Pr. [9th Ed.] 576.

This course, however, is seldom resorted to ; for when the case is one of difficulty or importance, the parties usually consent to have a Barrister, as Assessor.

The Inquiry may be executed before, or on, the day of its return ; and the Inquisition may be taken either at the Sheriff's office in *Preston*, or (during the assizes) at his office, at the assize town : or it may be taken at any of the sittings of the County Court at *Preston*, *Liverpool*, or *Manchester* ; when the Inquisition is taken at such sittings at *Liverpool*, or *Manchester*, the undersheriff charges a guinea extra.

When and where executed.

The course of proceeding on the Inquisition is nearly the same as on the trial of an issue, and it is not the practice of this Court, as of the Courts at Westminster, to obtain an order for a good jury : but the undersheriff will procure a good jury at the request of the party, and on his defraying the extra expense. The attendance of witnesses is compellable by writ of *Subpœna*, (a form of which is subjoined (s)), which is issued in the same manner, as a subpoena for attendance at the assizes. In common cases the attorneys themselves, or their agents, attend the inquisition ; but in special cases it is usual to employ Counsel. If the *Defendant* do not attend at the time mentioned in the notice, the Inquiry may be executed in his absence : and if he attends, he ought not to depart at the expiration

Proceedings on the inquisition.

(s) *Subpœna on an Inquiry.*

William the Fourth, &c. to greeting, We command and firmly enjoin you, and every of you, that all other things omitted, and every excuse set apart, you, and every one of you, be in your proper persons, before Esquire, sheriff of the County of Lancaster, or his Under-sheriff, on the day of next, [the day mentioned in the notice of Inquiry], at the said Sheriff's office, in [as in such notice] by of the clock in the noon, of the same day, then and there to testify and speak the truth, in a certain action on promises [or as the case may be], before our Justices of our Court of Common Pleas for our County Palatine of Lancaster, depending, between A. B., Plaintiff, and C. D., Defendant, on the part of the said Plaintiff, in which said action our certain writ of Inquiry of damages, to our same Sheriff, out of our said Court, before our said Justices sent and directed, is, before the same Sheriff, in form of law, to be then and there executed : and this you are not to omit, nor is any of you to omit, on pain of one hundred pounds. Witness, &c. [as in a Subpœna for the assizes, see ante pa. 147].

Note. When the witness is to produce documents, the form may easily be framed accordingly, see ante pa. 147-8.

of such time, for the Sheriff may have prior business, which may detain him beyond the time fixed (*t*) ; and it is said that the Defendant ought to wait an hour, at least, beyond that time (*u*). If, however, the *Plaintiff* neglects to attend, or to give countermand notice, the Defendant will be entitled to the costs incurred by his attendance. The inquisition may be adjourned, if necessary.

Return of the inquiry.

The Sheriff usually makes his return to the Inquiry, on application of the party ; but in case of refusal, he may be ruled to return it. The return is contained in a schedule, on parchment, annexed to the writ ; is signed and sealed in the name of the Sheriff, and jurors—and contains the parties' names—the day of taking the inquisition—the names of the jury—the amount of damages—and the names of the witnesses, with the places of their residence.

Filing the return.

The writ and return are usually handed to the *Plaintiff's* attorney, or his agent, who files the same with the Prothonotary : but the *Defendant* is entitled to have the inquisition filed, for the purpose of taking any objection to it (*v*), or of moving to arrest, or vacate the judgment : and if the *Plaintiff's* attorney refuse to file the writ, or to shew it to the Defendant's attorney, the Court will order this to be done, with costs (*w*).

Final judgment.

As to the time for entering judgment, and issuing execution after an inquiry, the practice has lately been altered. According to the former practice, when the Inquiry was returnable at the assizes, the *Plaintiff* could not enter final judgment until the fifth day of such assizes (Sunday excluded) (*x*) : and when the Inquiry was returnable on a monthly return, pursuant to statute 1, W. IV. c. 7, s. 8, it was thereby provided that such proceedings might be had on the return, as upon writs returnable according to the

Former practice

(*t*) *Williams v. Frith*, 1 Doug. 198.

(*u*) See 1 Sell. 352.

(*v*) As to the grounds on which an Inquisition will be set aside, see Arch. (by Chitty) 922.

(*w*) *Townsend v. Burns*, 1 Dowl. P. C. 629. 1 C. & M. 177, S. C. 3 Tyr. 104, S. C.

(*x*) *Evans' Pr.* 64-65.

law then in force, and which, as regulated by statute 39 and 40, Geo. III., c. 105, was, that no final judgment could be entered upon an Inquiry, returnable otherwise than at the assizes, until the expiration of ten days after the return, exclusive of the day of the return, and the day of entering judgment and issuing execution. Such was the practice before the statute 4 and 5, W. IV., c. 62 : whereby, we have seen, the writ of Inquiry shall be made returnable, on any day certain to be named therein, and by which it is enacted (z), that "at the return of every writ of Inquiry, costs shall be taxed, judgment signed, and execution issued *forthwith*, unless the Sheriff, or his deputy, before whom such writ of Inquiry may be executed, shall certify, under his hand, upon such writ, that judgment ought not to be signed, until the Defendant shall have had an opportunity to apply to this Court, or one of the Judges thereof, for a new Inquiry; or the said Court, or one of the Judges thereof, shall think fit to order, that judgment or execution shall be stayed, till a day to be named in such order." The 22nd section of the same Act provides, that "notwithstanding any judgment signed, or execution issued, as aforesaid, by virtue of this Act, it shall be lawful for this Court, to order such judgment to be vacated, and execution to be stayed, or set aside, and to enter an arrest of judgment, or grant a new writ of Inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution, shall be restored to all that he may have lost thereby, in such manner, as upon the reversal of a judgment by writ of Error, or otherwise, as the Court may think fit to direct."

Present practice

The Plaintiff is entitled to full costs after Inquiry, although the damages be under 40s., except in actions for slanderous words; for the restraining statutes 43, Eliz., c. 6, and 22 and 23, Car., 2, c. 9, (which are extended to the Courts of the Counties Palatine by statute 11 and 12, W. III., c. 9, s. 1), are confined to trials before a Judge (a); but the statute 21, Jac. 1, c. 16, s. 6, (as to actions for

Costs.

Right to.

(z) Sect. 21.

(a) See Hull. on Costs 38. Arch. (by Chitty), 966. Wardroper v. Richardson, 1 Ad. & Ell. 75. Harris v. Duncan, 2 Id. 158.

Allowance of costs.

slandorous words), applies to a writ of Inquiry, as well as a trial (b), and extends to all Courts of Record whatever. In all actions of *assumpsit*, *debt*, or *covenant*, where the debt recovered shall not exceed £20., the Plaintiff's costs shall be taxed according to the reduced scale of costs in similar cases, lately adopted in the Courts at Westminster (c). It is in the Prothonotary's discretion whether to allow or not, for Counsel's fees, and preparing briefs (d) : but in ordinary cases, these fees are not allowed ; nor will any allowance be made for the attorney's journey from another town, to attend the execution of the Inquiry, where it might have been attended by his agent : nor will Counsel's fees be allowed, in any case, unless there has been previous notice of an intention to employ Counsel.

Taxation.

It is not the practice to serve an appointment to tax costs, after an Inquiry, unless the Defendant's attorney shall have given notice of his intention to attend the taxation.

Execution.

Execution may now, as we have seen, be issued, of course, immediately on the Inquiry being returned, and the costs taxed ; provided there be no certificate to the contrary : but, if a year and a day elapse, after the taxation, and before execution, the judgment must be revived. Where, however, the Inquiry is not returned within a year, the Plaintiff may, on procuring the Inquisition, tax the costs, and issue execution, without a *scire facias* ; but in that case, it would seem that a month's previous notice of proceeding, should be given (e).

(b) See Hull. on costs 34. Arch. (by Chitty), 967. Bull. N. P. 329 Lampen v. Hatch, 2 Str. 934.

(c) Reg. Gen. (26) published as of Mar. Ass. 5 W. 4 ; & see Reg. Gen. (63) Mar. Ass. 2 W. 4, ante pa. 178 ; see also post B. 5 ch. 22, s. 1, and see the scale of allowance, 2 Dowl. P. C. 485 & seq.

(d) See Tidd's Pr. [9th Ed.] 580. Arch. (by Chitty), 598.

(e) See Reg. Gen. Sep. Ass. 2 Geo. 4, ante pa. 179 ; & 1 Sell. Pr. 269.

SECT. 2.

OF THE INQUIRY UNDER STAT. 8 & 9, W. III. c. 11, s. 8.

By the statute 8 & 9, W. III, c. 11, s. 8 (*f*), in an action Inquiry under 8 & 9 W. 3, c. 11, s. 8.
 "upon any bond or bonds, or on any penal sum for non-
 "performance of any covenants or agreements, in any in-
 "denture, deed, or writing," the Plaintiff, after judgment
 on demurrer, or by confession, or default, *must* (*g*) suggest
 breaches on the roll, and proceed to execute an Inquiry,
 in the manner pointed out by that Act.

Formerly the writ of Inquiry in such case, could only be To be executed before the Sheriff, unless otherwise ordered.
 executed before a Judge of assize, or nisi prius; but this
 course being both expensive and dilatory, it was provided
 by the statute 4 and 5, W. IV., c. 62, s. 18, that "all
 "writs of Inquiry of damages, to be issued by this Court,
 "under and by virtue of the statute 8 & 9, W. III., c. 11,
 "shall, unless the said Court, or one of the Judges thereof,
 "shall otherwise order, direct the Sheriff of the County
 "of Lancaster, to summon a jury, to appear before him,
 "instead of the Justices or Justice of assize, of and for
 "the said County, to inquire of the truth of the breaches
 "suggested and assess the damages that the Plaintiff shall
 "have sustained thereby; and shall command the said
 "Sheriff to make return thereof to this Court, on a day
 "certain, in such writ to be mentioned; and such pro-
 "ceedings shall be had, after the return of such writ, as
 "are in the said statute in that behalf mentioned, in like
 "manner as if such writ had been executed before a Justice
 "of assize, or nisi prius."

The writ of Inquiry under the above Act, may be issued Proceedings thereon.
 as a matter of course, without a previous order of the
 Judge. It is issued and tested as a writ of Inquiry in other
 cases; and may be made returnable, on a day certain to
 be named therein. Notice of the execution must be given
 as before mentioned; and such notice must be, to inquire
 of the truth of the breaches suggested, as well as to assess

(*f*) As to what cases are within the Act, and the proceedings under it—
 see 1 Williams' Saunders [4th Ed.] 58. Tidd's Pr. [9th Ed.] 583, and
 Arch. (by Chitty) 604.

(*g*) See Arch. by Chitty, 606. 1, Williams' Saunders 58, [4th Ed.].

the damages. Notice of intention to attend by Counsel should likewise be given, to entitle the Plaintiff to the Costs of such attendance : and a copy of the suggestion of breaches should be delivered to the Defendant, or his attorney (h).

The Inquiry being returned, execution may be issued forthwith, unless the Sheriff, or a Judge, shall have ordered a stay of judgment and execution, as before mentioned (i); or unless the execution be stayed, under the provisions of the statute 8 and 9, W. III. c. 11.

(h) *Gillingham v. Waskett*, Mc. Clcl. 568. 13 Pri. 791, S. C.

(i) *Ante* pa. 185.

BOOK 3. CHAP. III.

OF THE RULE TO COMPUTE.

We have seen that when interlocutory judgment is signed in an action of *assumpsit*, &c., the amount of damages must be ascertained, either by a writ of *Inquiry*, or by a reference to the Prothonotary: the latter course, however, can only be pursued, when the amount of damages is a mere matter of calculation, as in actions on Bills of Exchange, or Promissory Notes; or on Covenants, for payment of a sum certain—as on mortgage, for rent, or arrears of an annuity; or on an award, for payment of money (a).

Reference to the Prothonotary to compute damages, in what cases allowed.

But in order to entitle the Plaintiff to a reference to the Prothonotary, the instrument must be set forth in the declaration (b): and where the Declaration contains the common counts, in addition, the Prothonotary, in entering up final judgment, enters a *remittitur damna*, as to such other counts.

When the action is other than on a bill of Exchange, or Promissory Note, the mode of procuring a computation, (in cases allowing it), is by application, in the first instance, to the Court, or a Judge (c): but in an action of *assumpsit*, on a *Bill* (d), or *Note*, the Plaintiff may, immediately after interlocutory judgment, obtain from the Prothonotary, a rule *nisi* to compute the principal and interest thereon (e), a form of which rule is subjoined (f). This rule is

Rule nisi to compute.

(a) See further on this subject, Tidd's Pr. [9th Ed.], 570, & seq.

(b) *Osborne v. Noad*, 8 T. R. 648.

(c) See Tidd's Pr. [9th Ed.], 571.

(d) A bill of exchange payable in foreign money is an exception; and for other exceptions, see Tidd's Pr. [9th Ed.] 571. *Chitty on bills*, [6th Ed.] 370.

(e) Reg. Gen. Mar. Ass. 52, Geo. 3.

(f) Rule nisi to compute.

Clarendon. [August] Assizes, [6th W. 4.]
A. B. } The day of 1836. It is ordered by the Court that
v. } it be referred to the Prothonotary of this Court or his deputy,
C. D. } to compute the principal and interest due on the bill of exchange,

now granted of course, without an affidavit (as formerly required) of the nature of the action, and of judgment being signed; both these facts being ascertainable from the proceedings entered with the Prothonotary. When the rule is to shew cause in London, it is returnable in five days, or thereabouts; and when to shew cause on the circuit, in three or four days, after the date; and if no cause be shewn, the Judge, on the usual affidavit of service, attendance, and default, will order the rule to be made absolute.

Service of the Rule.

A copy of the rule *nisi* must be served upon the attorney or agent of the Defendant, if he shall have appeared, by attorney; or if not, then upon himself personally, or by leaving the same at his place of abode (*g*): a service on one of several Defendants has been held sufficient; because, by suffering judgment, they admit themselves to be partners *quoad* that transaction (*h*). Where a bill of Exchange was accepted, payable at a club house, (of which club the Defendant was a member), and it appeared that the servant of the Defendant called daily there, to receive messages and letters left for him, a service of the rule upon the porter of that club house, was held sufficient (*i*): but where the Defendant was an attorney, and the service was upon a servant of the laundress, at the Defendant's office, such service was held insufficient, though, if the laundress had been served, the service might have sufficed (*j*). It is not good service, merely to put the rule under the door of the Defendant's chambers (*k*), or to serve his landlady (*l*).

[or promissory note], on which this action is brought, and to tax the Plaintiff's costs; and that the Plaintiff be at liberty to sign final judgment for the amount of such principal, interest, and costs, without executing a writ of Inquiry, unless good cause be shewn to the contrary, before the honorable Chief Justice of this Court, at his chambers, in Serjeant's Inn, Chancery lane, London, [or if on the circuit, "before (the junior Judge), at his lodgings, in " on the day of instant, at o'clock in the [afternoon]. By the Court.

(*g*) See *Warren v. Smith*, 2 Dowl. P. C. 216. *Sealey v. Robertson*, Id. 568. *Payett v. Hill*, Id. 688.

(*h*) *Figgins v. Ward & others*, Id. 364. 2 Cr. & M. 424. 4 Tyr. 282, S. C.; but see *Flindt v. Bignell*, 1 Chitt. Rep. 466 n.

(*i*) *Ridgway v. Baynton*, 2 Dowl. P. C. 183.

(*j*) *Smith v. Spurr*, Id. 231.

(*k*) *Strutton & an. v. Hawkes*, 3 Id. 25.

(*l*) *Gardner v. Green*, Id. 343.

The Defendant may oppose the rule on the ground that the case is not such as ought to be referred to the Prothonotary: or that the amount due is a matter in dispute, and a proper question for a jury; and if the Judge be satisfied that it is so, he will discharge the rule, and leave the Plaintiff to execute a writ of Inquiry (*l*). But the Defendant cannot oppose the rule on the ground that the instrument is invalid (*m*); or that there is any irregularity in the proceedings *previous* to judgment (*n*): and where a rule was opposed on an affidavit, shewing that the judgment was irregular, in having been signed without a demand of plea, the Court held, that this was no objection to the rule; but that a cross motion to set aside the judgment should be made; and the rule to compute was enlarged, till the motion of the Defendant was determined (*o*). A rule to compute has been granted, where it appeared that the note had been destroyed (*p*); and, where a bill had been stolen, and no tidings gained of it, the Court referred it to the master to see what was due for principal and interest, on the production of a copy of the bill, verified by affidavit (*q*). In *Flight v. Brown* (*r*), however, where the drawer sued the acceptor, and the bill had been lost, the rule was granted, subject to the terms of producing a copy of the bill, verified by affidavit, *and on its being also sworn, that there was no indorsement on the bill itself.*

When the order to compute is obtained, the Plaintiff's attorney makes out his bill of costs, which, together with the order, he leaves with the Prothonotary, who grants a rule absolute, and an appointment to tax and calculate; a copy of which rule must be served, in like manner as the rule nisi; but no affidavit of service is necessary. The appoint-

(*l*) See Chitty's Gen. Prac. vol. 3, part 6, pa. 682.

(*m*) *Shepherd v. Charter*, 4 T. R. 275.

(*n*) *Pell v. Brown*, 1 B. & P. 369; see also *Marryatt v. Winkfield*, 2 Chitt. Rep. 119.

(*o*) *Marshall v. Van Omeron*, cited in Chitty on bills, pa. 371, [6th Ed.]

(*p*) *Clarke v. Quince*, 3 Dowl. P. C. 26.

(*q*) *Brown v. Mesaiter*, 3 M. & Sel. 281. See also *Allen v. Miller*, 1 Dowl. P. C. 420.

(*r*) 2 Tyr. 312., and see Smith's compendium of mercantile law, pa. 165 to 167.

ment must also be served, in order that the Defendant may have an opportunity of bringing forward any facts, to reduce the sum sought to be recovered (s).

Computation. The Prothonotary allows interest on bills and notes, at the rate of five per cent., up to the period of computation; and he requires the original bill or note to be then produced, in order to ascertain whether it corresponds with the one declared upon, and whether any memorandum of payment of principal or interest, is indorsed. In some cases, however, as we have seen, the production of the original bill or note is dispensed with.

Execution. The damages being computed, and the costs taxed, the Plaintiff may issue execution immediately, and make it returnable as in other cases.

(s) *Branning v. Patterson*, 4 Taunt. 487.

BOOK 3. CHAP. IV.

OF JUDGMENT ON A WARRANT OF ATTORNEY (a).

A Warrant of Attorney may be taken, though no action is pending; and the only peculiarity in the form of it, as used in this Court, is, that it is directed to attorneys of this Court, and authorises them to confess judgment therein.

Form of warrant
of Attorney.

Every warrant of attorney must be upon a proper stamp (b), and duly executed. It is not absolutely necessary that there should be an attesting witness (c), unless the warrant be given by a Defendant in custody; and in that case, it is provided, by a late rule (d), "that no warrant of attorney to confess judgment, or *cognovit actionem*, given by any person, in custody of the Sheriff (e), or his officer, upon *mesne process*, shall be of any force, unless there be present, some attorney, on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such

Stamp duty on,
and attestation
of, the warrant.

Execution of the
warrant when
the Defendant
is in custody.

(a) With respect to the nature and operation of warrants of attorney—when they are revocable—when countermanded by death, marriage, or otherwise—and in what cases they will be ordered to be given up, &c.; see Tidd's Pr. (9th Ed.) 545 & seq. Arch. (by Chitty), 569 & seq. 1 Sell. 378-9.

(b) By statute 55 Geo. 3, c. 184. sched. part 1, the same duty is imposed upon a warrant of attorney, as on a bond for the like amount, except when the same amount is secured by bond, mortgage, or other security, which has paid the *ad valorem* duty, and except the warrant of attorney be given to secure a sum of money, for which the person giving the same, is in custody under an arrest, in which cases the stamp is £1. The defeazance does not require a separate stamp. See Chitt. on the stamp laws, pa. 220. The objection to the want of a proper stamp is cured by getting the warrant duly stamped before shewing cause against a motion to set aside the judgment, see *Burton v. Kirkby*, 7 Taunt. 174; and see the next chapter.

(c) *Kinnersley v. Mussen*, 5 Taunt. 264.

(d) Reg. Gen. [31] March Ass. 2 W. 4, which rule though made before the statute 4 & 5 W. 4, ch. 62, has since been extended to proceedings under that Act, see ante pa. 52.

(e) Prisoners for debt in the Castle at Lancaster, are considered to be in the custody of the Sheriff.

"warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness, to the due execution thereof; and declare himself to be attorney for the Defendant, and state that he subscribes as such attorney."

Reason of making the above rule.

This rule, except as to the declaration of the attorney, is similar to the old rule of the Court of King's Bench, of E. T. 4, Geo. II., and resembles rule (72) of H. T. 2, W. IV. The reason of making these rules is, to protect a person arrested and in custody on *mesne process*, from the consequences of an act, by which, in consideration of his being released from immediate imprisonment, he might subject himself to the payment of a larger sum than is really due: but where he is charged in *execution*, that

What cases are within the rule.

mischiefs are not to be apprehended, and therefore, the rule does not apply to such a case (*f*). If, however, any fraud or imposition be practised upon a party in custody, under a writ of execution, in obtaining from him a warrant of attorney, or cognovit, the Court will grant relief (*g*). The rule does not extend to the case of a prisoner in custody, on a criminal charge (*h*); or at the suit of a party, who is not the person to whom the warrant of attorney is given (*i*): but where, from the conduct of the parties the Defendant is led to believe he is under duress, though not in fact so, the presence of an attorney is necessary (*j*); and so too, when others, not in custody, join in the warrant (*k*).

Presence of the Defendant's attorney.

As respects the presence of an attorney, he must be a practising attorney, though he need not be an attorney of this Court; and a clerk (*l*), or an uncertificated attorney (*m*), is not sufficient; neither will the presence of the *Plaintiff's* attorney suffice, though consented to by the Defendant (*n*);

(*f*) *Crompton v. Steward*, 7 T. R. 19; and see *Watkins v. Hanbury* 2 Str. 1245.

(*g*) *Fell v. Riley*, Cowp. 281.

(*h*) *Charlton v. Fletcher*, 4 T. R. 433.

(*i*) *Smith v. Burlington*, 1 East, 241; but see *Faulkner v. Emmett*, 8 Taunt. 233.

(*j*) *Turner v. Shaw*, 2 Dowl. P. C. 244.

(*k*) *Valentine v. Gulland & ors.*, 2 Taunt. 49.

(*l*) *Barnes v. Ward*. *Barnes* [Ed. of 1772] pa. 42.

(*m*) Arch. [by Chitty], 571.

(*n*) *Hutson v. Hutson*, 7 T. R. 7.

nor is it sufficient if the Plaintiff's attorney bring another attorney with him, who is not known to, or sent for by, the Defendant, even though he may have acquiesced (o). If, however, the Defendant be an attorney, the presence of another attorney is unnecessary (p); and if any fraud be practised by the Defendant, as in introducing one to attest his execution, as his attorney, who is not an attorney, this will take the case out of the rule (q). The rule, however, is to be strictly complied with, and it must appear that the attorney who attended on behalf of the Defendant, did so, at his request, and was expressly named by him (r). The attorney must sign his name as such; but it seems to be a sufficient compliance with the rule, if he makes the declaration *viva voce* (s).

By a late statute (t), in order to render a warrant of attorney available *against creditors*, in the event of a commission of bankrupt being afterwards issued against the Defendant, under which he shall be duly declared a bankrupt, it is necessary either to file the warrant of attorney, or a copy of it, or to enter up judgment thereon, within 21 days after its execution, otherwise the judgment and execution issued thereon, will be as void as against the *assignees*, who may recover back the money levied, or the effects seized. This provision has not been repealed by the statute 6, Geo. IV., c. 16, s. 81; and hence it has been held, that an execution upon an unregistered warrant of attorney, is void as against assignees, if issued after an act of bankruptcy, though more than two months before the issuing of the commission (u). The execution, however, is rendered

Registering the warrant of attorney, under statute 8 Geo. 4, c. 39.

(o) *Walker v. Gardner, & ors.* 4 Barn. & Adol. 371; but see *Osborne v. Davis*, 4 Taunt. 797.

(p) *Barnes* [Ed. of 1772] pa. 37.

(q) *Jeyes v. Booth*, 1 Bos. & P. 97.

(r) *Fisher v. Nicolas*, 2 Dowl. P. C. 251. 2 C. & M. 215, S. C. nom. *Fisher v. Papanicolas*. 4 Tyr. 44 S. C. Bligh & ors. v. *Brewer*, 3 Dowl. P. C. 266.

(s) *Wilson v. Price*, 4 Dowl. P. C. 213. *Robinson v. Brooksbank*, id. 395.

(t) 3 Geo. 4, c. 39, s. 1 & 2.

(u) *Wilson & an. Assignees v. Whittaker & others*, 1 Moody & M. 8.

void only as against assignees under Bankruptcy, (and not against others (*v*)) and the provision has been extended to the assignees of insolvent debtors (*w*).

Where, and how registered.

The filing of the warrant of attorney or copy, under the above Act, must be, with the Clerk of the dockets and judgments, of the Court of King's Bench; even though the warrant be to enter up judgment, in this Court only: and a verified copy of the warrant, together with an affidavit of its execution, must be filed with such Clerk, who enters in a book, kept for that purpose, in alphabetical order, the name and description as well of the person giving the warrant of attorney, as of the party in whose favor it is given, together with the dates of execution, and filing—the sum for which judgment is to be entered up—the amount specified in the defeazance—and the time when payable. This book may be searched, and the warrant of attorney or copy inspected, by any person, on payment of 6d. for the search against one person; and a copy of the warrant may be had, on payment of the usual fee. The fee for filing the warrant, and entering the same, is 1s. (*x*).

Defeazance when to be written on the warrant.

If a warrant of attorney, or cognovit, be subject to any defeazance, such defeazance must be written on the same paper or parchment, before filing, as above, or the instrument will be void (*y*), as against assignees, in the event of the Defendant's bankruptcy (*z*), or insolvency (*a*); though valid as between other parties (*z*). It is a rule of the Courts at Westminster, that an attorney who prepares a warrant of attorney, subject to a defeazance, must cause the same, or a memorandum thereof, to be written on such warrant; and his omission to do so, makes him amenable, on motion, for a breach of duty; but does not avoid the warrant (*b*).

(*v*) *Aireton v. Davis*, 9 Bing. 740.

(*w*) 5 Geo. 4, c. 61, s. 16, & 7 Geo. 4, c. 57, s. 33; but warrants of attorney required to be executed by Insolvent debtors, before adjudication by the Insolvent Court, are not within the Act. See statute 11 Geo. 4, & 1 W. 4, c. 38, s. 3.

(*x*) Chap. Prac. K. B. [2nd Ed.] 287.

(*y*) 3 Geo. 4, c. 39, s. 4.

(*z*) *Morris v. Mellin*, 6 B. & C. 446. *Bennett v. Daniel*, 10 B. & C. 500. *Aireton v. Davis*, 9 Bing. 740.

(*a*) 7 Geo. 4, c. 57, s. 33.

(*b*) *Shaw v. Evans*, 14 East 576. *Partridge v. Fraser*, & *an.* 7 Taunt. 307.

Judgment may be entered up (if there be no stipulation to the contrary) at any time within a year and a day after the date of the warrant of attorney, as a matter of course : but after that time, it cannot regularly be entered without a rule of Court ; though, if entered without such rule, none other than the Defendant can take advantage of the omission (c).

If the warrant be above a year and a day, but under ten years, old, the Prothonotary will grant a rule *absolute*, in the first instance, for judgment, upon the production of an affidavit, shewing the consideration for, and due execution of, the warrant of attorney—that the Defendant was living, at a certain day in the affidavit mentioned—and, the amount still owing. The execution of the warrant must be deposed to, by the attesting witness, if there be one ; and if he be dead, or abroad, that fact as well as his hand-writing must be verified (d), or if he cannot be found, the affidavit must state, that endeavours have been made to find him (e). With respect to the Defendant's being alive, the affidavit must shew, that he was living on a certain day, which must be within *twelve* days before the application to enter up judgment : but if he be abroad, a longer time will be allowed, according to circumstances ; four months, for instance, if he be in the West Indies (f). The fact of his being *alive* must be positively sworn to ; for mere information and belief is not enough (g). It is usual to make oath that he has been seen and conversed with, within the time required : but it would seem, that a letter from him, dated within such period, if verified by affidavit, is sufficient (h). The affidavit of the debt being owing, may be sworn to, by the Plaintiff, or his agent ; or by his attorney, if it sufficiently appears that he has the means of knowing the fact (i).

(c) *Jones v. Jones*, 1 Dowl. & R. 558.

(d) *Appleton v. Bond*. 1 Chitty's Rep. 744. *Taylor v. Leighton*, 2 Dowl. P. C. 746.

(e) *Waring v. Bowles*, 4 Taunt. 132. *Young v. Showler*, 2 Dow. P. C. 556.

(f) *Fursey v. Pilkington*, 2 Dowl. P. C. 452.

(g) ——— *v. Hobson*, & ora. 1 Chitt. Rep. 314.

(h) *Anon.* 1 Chitt. Rep. 617 [a]. *Sanders v. Jones*, 1 Dowl. P. C. 367.

(i) *Ashman v. Bowdler*, 4 Tyr. 84. 2 Cr. & M. 212, S. C.

On a warrant of attorney above ten years old. When the warrant of attorney is above *ten* years old, the Prothonotary will only grant a rule *nisi*, to enter up judgment (*j*); and where it is more than *twenty* years old, the affidavit in support of the rule, should state facts which rebut the presumption of payment (*k*).

Intituling affidavits.

It is no objection to the affidavits in support of an application, to enter up judgment, that they are intituled in the cause (*l*); but as there is not, in fact, any cause in Court, the affidavits are sufficient, if intituled of the Court, without stating the cause (*m*).

Mode of entering up judgment

In entering up judgment, the warrant must be strictly pursued. The Plaintiff's attorney prepares a declaration in debt, or otherwise, as the warrant authorizes; which declaration is subscribed by the Defendant's attorney, who signs his name to a confession of the action; if in debt, by *nil dicit*, or *non sum informatus*; or, if in assumpsit, he confesses the action, and that the Plaintiff hath sustained damages to the amount authorized, besides costs. The warrant is left with the Prothonotary, together with the declaration, and a memorandum of the Plaintiff's attorney's retainer to enter up judgment. If the *ad valorem* duty be not impressed upon the warrant, the Prothonotary requires the production of the deed, or bond, upon which the full duty has been paid (*a*). It is not usual to make out a bill of costs, the amount thereof being fixed, in all ordinary cases, at £4. 10s. 8d.; this sum, however, does not include the costs of preparing the warrant of attorney, which, unless otherwise shewn, are presumed to have been previously paid.

Execution.

Execution may be issued immediately, if there be nothing in the defeazance to prevent it; and may be made returnable as in other cases. But by the general bankrupt act (*n*), "no creditor, though for a valuable consideration,

(*j*) Reg. Gen. Mar. Ass. 57 Geo. 3.

(*k*) Hulke v. Pickering, 2 B. & C. 555.

(*l*) Sowerby v. Woodroff, 1 B. & Ald. 567.

(*m*) *Exparte* Gregory, 8 B. & C. 409. *Davis v. Stanbury*, 3 Dowl. P. C. 440.

(*a*) But see ante pa. 193 note b.

(*n*) 6, Geo. 4 c. 16, s. 108.

"who shall sue out execution upon any judgment, obtained After bank-
 "by default, confession, or *nil dicit* (o), shall avail himself ^{ruptey.}
 "of such execution, to the prejudice of other fair creditors,
 "but shall be paid rateable with such creditors " unless the
 goods shall be *seized* upwards of 2 months before the is-
 suing of the commission, (p) ; and the protecting clause of
 the statute, 1, W. IV., c. 7 (q), does not extend to warrants
 of attorney (r).

It is also provided by the Insolvent Act, that where any ^{After insolvency}
 person who shall petition the Insolvent Court, shall have
 given any warrant of attorney, or *cognovit*, no person shall,
after the commencement of the imprisonment of such prison-
 er, avail himself of any *feri facias*, issued upon any judgment
 thereon ; but shall be a creditor for the same ; and this
 even though the goods may be seized *before* the imprison-
 ment (s).

If execution be not issued within a year and a day after
 judgment, it is necessary to revive the judgment by *scire*
facias : but a stipulation in the warrant of attorney, that
 execution may issue after that time, without a *scire fa-*
cias, is legal (t).

(o) These words comprise every species of judgment obtained against a
 defendant, except judgment after verdict, trial by the record, and on de-
 murrer ; per Tindal, C. J. in *Cuming v. Welsford*, 6 Bing. 504.

(p) See sec. 81 of the act ; and see *Godson v. Sanctuary*, 4 B. & Adol.
 255. 1 Nev. & M. 52, S. C. *Wilson & an. v. Whittaker, & others*, 1
Moody, & M. 8, ante pa. 195.

(q) See post pa. 200.

(r) *Crossfield & ora. v. Stanley*, 4 B. & Ad. 87. 1 N. & M. 668, S. C.

(s) 7 Geo. 4, c. 57, s. 34 ; and see *Kelcey v. Minter & an.* 1 Bing.
 N. C. 721.

(t) *Morris v. Jones*, 2 B. & C. 242. 3 D. & R. 603, S. C.

BOOK 3. CHAP. V.

OF JUDGMENT ON COGNOVIT.

At what time a cognovit may be taken. A *cognovit actionem*, may be taken at any time pending the action, even before the process is *served* (a); and in one case, the Court of Exchequer held, that it was sufficient, if taken after instructions for the writ had been sent to the agent, and before the writ was actually *issued* (b). It must be signed by all the Defendants; and where parties execute at different times, the execution by the last relates back to the time of the execution by the first (c). If given after plea, it sometimes contains a clause authorizing the plea to be withdrawn: but this is unnecessary.

When advisable to declare before taking a cognovit.

But though it is not necessary to *declare*, before a cognovit is taken, yet this is advisable, where bankruptcy of the Defendant, is anticipated; for, notwithstanding the general bankrupt act, (6, Geo. IV., c. 16, s. 108), which provides, "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment, obtained by default, confession, or *nihil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors; but shall be paid rateable with such creditors (d);" yet, by a subsequent statute (e), (after reciting the above clause), it is provided, "that no judgment signed, or execution issued, on a *cognovit actionem* signed *after declaration* filed or delivered, or judgment by default, confession, or *nihil dicit*, according to the practice of the Court, in

(a) *Kerbey v. Jenkins*, 2 Tyr. 499.

(b) *Wade & ors. v. Swift*, 8 Pri. 513.

(c) *Perry v. Turner & ors.* 1 Dowl. P. C. 300. 2 Tyr. 128, 8 C. Cr. & J. 89, 8 C.

(d) See ante pa. 199.

(e) 1 W. 4, c. 7. s. 7.



"any action commenced adversely, and not by collusion
 "for the purpose of fraudulent preference, shall be deemed
 "or taken to be within the said provision of the said recited
 "act (f)."

There is nothing peculiar in the form of a cognovit to be used in this Court. If it be given in an action of *assumpsit*, the Defendant confesseth "the action, and that the Plaintiff hath sustained damages to [the actual amount] besides costs, to be taxed by the Prothonotary:" and if the costs are intended to be "as between attorney and client," these words should be added. When the action is in *debt*, the Defendant confesseth "the debt, in this action, and that the Plaintiff hath sustained damages to one shilling besides costs," as before. The terms (if any) then follow — and if the cognovit be subject to any *defeazance*, it must be stated thereon, to render it available against assignees, under bankruptcy or insolvency (g). As the statute 4 and 5, W. IV., c. 62, requires the nature of the action to be stated in the first process, care should be taken in preparing the cognovit, that it agrees with the writ in this particular, otherwise there may be a difficulty in entering up the judgment.

A cognovit, merely as such, does not require a stamp: but if it be for the sum of *twenty* pounds, or upwards, and subject to *terms*, an agreement stamp is necessary (h). A cognovit, however, (upon terms), for *thirty* pounds, to secure *five* pounds and costs, is not a cognovit for the payment of *twenty* pounds, so as to render a stamp necessary (i). It is not clearly defined what are such terms as to require a stamp; but it has been held, that a stamp is requisite where the cognovit contains an agreement to pay the debt by instalments (j); and also, where the stipu-

(f) This clause does not extend to judgments on warrants of attorney, see ante pa. 199.

(g) See ante pa. 196.

(h) *Morley v. Hall*, 2 Dowl. P. C. 494. *Rose v. Temblissen*, 3 Id. 49.

(i) *Ames v. Hill*, 2 B. & P. 150.

(j) *Id. Beardon v. Swaby*, 4 East. 188.

lation is, that judgment is not to be entered up till after default of payment, on a certain day following (*k*).

When a stamp
is not necessary

A stamp, however, is not it seems necessary, where the cognovit merely contains a stipulation by the *Defendant*, that no writ of Error shall be brought, or bill in Equity filed (*l*); nor where the Plaintiff's attorney, at the time of the execution of the cognovit, gives a memorandum, on a separate paper, that the Defendant is to have time (*m*).

When stamp
may be impress-
ed.

Although a cognovit containing terms, must be stamped, yet it is sufficient to support an execution under it, if it be stamped, before cause is shewn against a rule for setting aside the execution (*n*): and the time for shewing cause will, it seems, be enlarged, to give the Plaintiff an opportunity of getting the cognovit stamped (*o*): the objection, therefore, to the cognovit, on the ground of its not being stamped, may be of no avail (*p*); and where the judgment is set aside on that ground, the cognovit will be suffered to remain on the file, and when stamped, a fresh judgment may be signed, and execution taken out (*q*).

Attestation of
cognovit given
by a prisoner.

The same rule which requires an attorney to be present, to attest the execution of a warrant of attorney, given by a prisoner in custody, on mesne process, extends to cognovits (*r*).

Filing cognovit
under 3 Geo. 4
c. 39.

That the cognovit may be available in the event of bankruptcy, or insolvency, it must be *filed*, (pursuant to statute 3, Geo. IV., c. 39, s. 3,) within the same period, and in the like manner, as a warrant of attorney, otherwise it will be inoperative, as against the *assignees* (*s*).

(*k*) *Pitman v. Humfrey*, 2 Tyr. 500; see also *Morley v. Hall*, *infra*; but see *Jay v. Warren*, 1 Car. & P. 532.

(*l*) *Green v. Gray*, 1 Dowl. P. C. 350.

(*m*) *Morley v. Hall*, 2 Dowl. P. C. 494.

(*n*) *Pitman v. Humfrey*, *supra*. *Rose v. Tomblinson*, 3 Dowl. P. C. 49. *Clarke v. Jones*, *Id.* 277; and see *Burton v. Kirkby*, 7 Taunt. 174.

(*o*) *Doe dem. Phillips v. Roe*, 5 B. & Ald. 766.

(*p*) Per Parke, B. in *Clarke v. Jones*, *supra*.

(*q*) *Pitman v. Humfrey*, *supra*.

(*r*) See the rule and the decisions thereon, *ante* pa. 193-4-5.

(*s*) See *ante* pa. 195-6.

though not as against others (*t*). It is observable, that this section in speaking of cognovits, mentions *filing* only, and does not, like the preceding clause of the Act, (relative to warrants of attorney), prescribe the alternative of filing, or entering up judgment, within twenty one days: and it has not been determined whether the entering up of judgment on a cognovit, within that time, is equivalent to registration. A book for the entry of cognovits, similar to that for the entry of warrants of attorney, is kept by the Clerk of the dockets and judgments, in the Court of King's Bench; which book may be searched, and an office copy of the cognovit had, on the same terms, as before mentioned, respecting warrants of attorney (*u*).

If no time be given by the cognovit, the Plaintiff may tax his costs, immediately, and issue execution; and this even, as we have seen (*v*), during the assizes at which the cause is entered for trial: but a *feri facias* cannot be executed after the commencement of a Defendant's imprisonment, who has petitioned the insolvent Court (*w*). At what time judgment may be entered.

If judgment be not entered within a year and a day after the date of the cognovit, an affidavit must be produced, of the amount remaining due: but it is not necessary to swear to the execution of the cognovit, or that the Defendant is living. If execution be not issued within a year and a day after judgment, the judgment must be revived: but a stipulation to waive the necessity of a *scire facias*, is binding (*w*).

On entering up judgment, a bill of costs must be made out, and taxed by the Prothonotary: but no appointment to tax is necessary, even where the cause has been brought to issue. The cognovit is filed with the Prothonotary: and if a declaration has not been previously filed, the Plaintiff must file one; in which case, one count only, will, in general, be allowed for, in the costs. The cognovit is deemed an Mode of entering judgment.

(*t*) Green v. Gray, 1 Dowl. P. C. 350 and see ante pa. 195-6.

(*u*) Ante pa. 196.

(*v*) Ante pa. 174.

(*w*) Ante pa. 199.

appearance, and it is not the practice of this Court, to file a separate memorandum of appearance. Where the cognovit is given after the enrolment of the record, and before the cause is entered for trial, the costs of enrolment will be allowed (y) ; and when given after the Plaintiff has incurred costs of preparing for trial, an affidavit of increase must be produced, on taxation.

As to a cognovit, operating in discharge of bail, or the Sheriff—see the authorities referred to below (z).

(y) See ante pa. 140.

(z) Arch. (by Chitty) 167-497-8. Tidd's Pr. [9th Ed.] 295-301-305-315 1097, and see *Hannington v. Beare & an.* 4 Dowl. P. C. 256.

BOOK 4.

OF PROCEEDINGS IN PARTICULAR ACTIONS (a).

CHAP. 1.

OF PROCEEDINGS IN EJECTMENT.

Proceedings in Ejectment, in this Court, are commenced either by Declaration, (which is the usual mode), or by writ of Pone.

SECT. 1.

OF THE PROCEEDING BY DECLARATION.

The Declaration against the casual ejector, is substantially the same, as in the superior Courts at Westminster. It may be intituled of a particular day, as declarations in personal actions (b), though the rule of Court, requiring declarations to be so intituled, does not, it seems, apply to actions of ejectment (c); and it must, unless otherwise ordered, have in the margin, the words "Northern Division," or "Southern Division," as the lands may be, in one or the other division of the county (d); a misstatement in which respect, would, it seems, be an irregularity.

(a) This book is confined to those particular actions in the proceedings of which there are rules of practice peculiar to this Court—as actions of Ejectment, and Replevin, on Recognizance of bail, and against Prisoners; touching the proceedings in other particular actions, as against Peers, Members of Parliament, Hundredors, Justices of the Peace, Clergymen, Constables, Heirs on the bonds of their Ancestors, Prisoners under the Lords' Act, and Insolvent Act, or Paupers: or in actions by, or against Corporations, Executors or Administrators, Bankrupts or their Assignees, Husband and Wife, Infants, Idiots, or Lunatics; see Arch. (by Chitty): and Tidd's Pr. [9th Ed.]

(b) Doe dem Ashman v. Roe, 1 Bing. N. C. 253.

(c) Doe dem Evans v. Roe, 2 Ad. & E. 11.

(d) See ante pa. 37-38.

The declaration must be filed in the Prothonotary's office, and a copy thereof, with the usual notice (*e*), delivered to the tenant in possession: but where it is intended to apply for bail, pursuant to statute 1, Geo. IV., c. 87, then in addition to such notice, a notice should be given, signed by the lessor of the Plaintiff, that the tenant will be required to give bail, according to that statute (*f*).

At what time to be filed.

Formerly the declaration against the casual ejector was required to be filed, and the copy delivered to the tenant, on or before the first day of every Hilary or Trinity Term (*g*), to enable the Plaintiff to obtain judgment, against the casual ejector at the next rule day, or to proceed to trial at the following assizes; or if the action was brought by *landlord* against *tenant*, between the August and March assizes, the declaration was to be filed, and served, on or before the third day of February, to entitle the Plaintiff, to proceed as above-mentioned (*h*); but now, "declarations in ejectment may be filed at any time, without reference to terms, or rule days (*i*).

Upon whom served.

The service of the declaration, being regulated by the same practice which prevails in the Courts at Westminster, it may suffice to observe generally, that *personal* service upon the *tenant*, is good, anywhere: and service on his *wife*, upon the premises, or at her husband's house, is sufficient; or, it seems, that service on her anywhere, will suffice, provided

(*e*) Notice to appear, &c.

To C. D. [*the Tenant*].

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of Ejectment, or to some part thereof; and I being sued in this action as a casual Ejector only, and having no claim or title to the same, do advise you to appear in his Majesty's Court of Common Pleas at Lancaster, within fourteen days next after service hereof, by some attorney of that Court, and then and there by a rule of the same Court, to cause yourself to be made Defendant in my stead, otherwise I shall suffer judgment to be entered against me by default, and you will be turned out of possession. Dated the day of 1836.

Your sincere Friend, Richard Roe.

(*f*) As to the time and manner of putting in bail, and as to other proceedings under the statute, see Tidd's Pr. [9th Ed.], 1209-1221-1239; and Arch. [by Chitty], 646 to 653.

(*g*) Reg. Gen. Lent Ass. 1751.

(*h*) Reg. Gen. (53) Mar. Ass. 2 W. 4.

(*i*) Reg. Gen. (12) Mar. Ass 5 W. 4.

she be living with her husband (j) : but if neither the husband nor his wife can be served, then service on *one of his family*, or his *servant, on the premises*, will suffice, if it appear, by affidavit, on the application for judgment against the casual ejector, that the tenant afterwards received the declaration, and knew the meaning of it (j). Where the service has been made under special circumstances, the Judge allows it, or not, in his discretion, according to the exigency of the case; and he sometimes requires the Tenant to shew cause, why the service ought not to be deemed good; a summons for which purpose will be granted, as well before service, (if the difficulty be then contemplated), as after.

Such service must, formerly, have been effected before the expiration of the time for filing the declaration against the casual ejector, but now it may be made, at any time. At the time of service, the nature and meaning thereof, should be stated, which is usually done, by reading over, and explaining to the tenant, the notice subjoined to the declaration; and it will suffice to read it over without explaining it, or to explain it without reading it over (k); but the explanation ought to be made 14 days, at least, before the application for judgment against the casual ejector.

“ In all actions of Ejectment by declaration, if the tenant or tenants, or such other person, or persons, as shall, by this Court, be suffered or permitted to be made defendant, or defendants, in the room or stead of the casual ejector, either with or without such tenant, or tenants, do not appear, within *fourteen* days next after service of the declaration, upon the tenant, or tenants, in possession of the lands or premises in question, and enter into the usual and common consent rule, judgment by default may be immediately entered, by order of one of the Judges of this Court, to be made upon the usual affidavit of service (l).”

(j) Arch. [by Chitty], 614, which see further as to service.

(k) Doe v. Roe, 1 Dowl. P. C. 428. Doe dem Jones v. Roe, Id. 518. Doe v. Roe, 2 Id. 199.

(l) Reg. Gen. [13] Mar. Ass 5 W. 4.

Mode of obtaining judgment against the casual ejector.

Formerly, the only mode of obtaining judgment against the casual ejector, was by motion to the Court, on the usual affidavit of service; and although the Plaintiff may now, as formerly, apply by motion, yet, according to the above rule, he may have an order for judgment, immediately after default of appearance. To obtain such order, affidavits must be made, of the service of the declaration (*m*), and that the tenant in possession has not appeared, nor entered into the usual consent rule, according to the practice of this Court. Upon the production of such affidavits, an order for judgment will be granted, in the first instance, provided the service of the declaration was in the common way; but if otherwise, the Judge will grant a summons only, directing, if necessary, the mode of service; and he will also give the tenant an opportunity of shewing cause, where judgment is not applied for, within a reasonable time (*n*).

It is not the practice of this Court, to serve a rule for judgment; nor to take it out: but judgment may be entered, as soon as the order for it is obtained, and should be entered without unreasonable delay; for where a rule for judgment was obtained, the Court, after a lapse of four years, refused to allow judgment to be entered (on an affidavit that the same tenant was still in possession, and had not paid any rent, since the commencement of the proceedings) saying that there could be no *scire facias*, as there had been no judgment; and that it was too late to enter up judgment, in that Ejectment(*o*).

Appearance.

The appearance is entered, either by the tenant, or his landlord, or both. The tenant may appear alone, on entering into the consent rule, without a separate rule for that purpose; but, when the landlord joins with him in the defence, it is necessary to obtain an express rule to join them; and this the Prothonotary will grant of course, without motion or affidavit: where, however, it is intended to make the landlord defendant in the tenant's

(*m*) See form of such affidavit, Chitty's forms, 426: and as to the requisites of the affidavit, see Arch. [by Chitty], 618. Tidd's Pr. [9th Ed.] 1215.

(*n*) Right dem. Jeffery v. Wrong, 2 Dowl. P. C. 348.

(*o*) Doe dem. Taylor v. Roe, Lan. Mar. Ass. 1824.

stead, a special application for that purpose must be made to the Court, or one of the judges thereof.

At the time of entering the appearance, the new defendant must also enter into the usual consent rule, a form whereof is subjoined (*p*). This rule is obtained from the Prothonotary, in blank, filled up by the defendant's attorney, and signed by him: it is then filed with the Prothonotary, and afterwards (usually when the declaration is filed against the new Defendant) signed by the Plaintiff's attorney. The Prothonotary will afterwards, when required, draw up a rule thereupon, which is the same in every respect, as the one signed, leaving out the names of the attorneys.

Formerly, the defendant was not required by the consent rule, to confess that he was, at the commencement

Consent rule.

(*p*) Clarendon. [March] Assizes 6th Wm. 4th.
 John Doe [on the] } It is ordered, by the consent of the attorneys of both
 demise of A. B. } parties, that C. D., [the tenant], be made Defendant
 v. } in the stead of the now Defendant Richard Roe, and
 Richard Roe. } do forthwith appear at the suit of the Plaintiff, and
 receive a declaration in an action of Trespass and Ejectment, for [part of] the premises in question, which [said part of the said] premises, he the said C. D., hereby admits to be, or consist of [one messuage or dwelling-house, with the appurtenances situate at] for which he intends as tenant to defend this action of Trespass and Ejectment; and it is further ordered by the like consent that the said C. D., do forthwith plead not guilty thereto, and upon the trial of the issue, confess lease, entry, and ouster, and that he was, at the time of the service of the declaration [or "the writ of Pone"] in possession of the premises, herein-before mentioned and specified, and insist upon the title only, otherwise let judgment be entered for the Plaintiff, against the now Defendant Richard Roe, by default, and if, upon the trial of the said issue, the said C. D. shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the Plaintiff shall not be able further to prosecute his suit against the said C. D., then no costs shall be allowed for not further prosecuting the same, but the said C. D. shall pay costs to the Lessor of the Plaintiff in that case to be taxed, by the Prothonotary of this Court, or his deputy: And it is further ordered, that if upon the trial of the said issue, a verdict shall be given for the said C. D., or it shall happen that the Plaintiff shall not further prosecute his said suit for any other cause than for not confessing lease, entry, and ouster, and such possession as aforesaid, then the lessor of the Plaintiff, shall pay to the said C. D. costs in that case to be adjudged.

To be signed by the attorneys, thus:—E. F., Attorney for the Plaintiff.

G. H., Attorney for the Defendant.

Note.—If both landlord and tenant appear, their names must be inserted in the rule, and it is stated, that the one intends as landlord, and the other as tenant, to defend, &c., and if the landlord alone defend, the rule may be altered accordingly.

of the action, in possession of the premises; and it sometimes happened, after the lessor of the plaintiff had proved his title, that he was nonsuited, for want of proving such possession; to remedy which inconvenience, it has been provided (q) that "the defendant shall specify in the consent rule, for what premises he intends to defend; and shall consent in such rule, to confess, upon the trial, that the defendant (if he defends as tenant, or, in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises; and that if upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit, against the said defendant, then, no costs shall be allowed, for not further prosecuting the same; but the said defendant shall pay costs to the lessor of the plaintiff, in that case to be taxed."

Declaration against the real Defendant.

The new defendant having appeared, and entered into the consent rule, the next step is, to file a declaration against him, with the Prothonotary; which declaration is similar to the one against the casual ejector, substituting for his name, that of the new defendant. Notice of declaration must be given, as in other cases, to the defendant's attorney, or his agent.

At what time to be filed.

When the practice was for the Plaintiff to declare on or before the first day of Hilary or Trinity Term, as before stated, it was necessary, in case the tenant appeared at the rule day next after service of the declaration, to declare against him, at such rule day, or within three days afterwards; otherwise, the new defendant was not obliged to plead issuably, for the then next assizes (r): but now, as we have seen (s), the declaration "may be filed at any time, without reference to terms or rule days." It must, however, be filed before the rule day after the assizes, next succeeding the time of entering the appearance, or the Defendant will be entitled to nonpros, as in other cases (t).

(q) Reg. Gen. Mar. Ass. 2 Geo. 4.

(r) Reg. Gen. Lent Ass. 1751.

(s) Ante pa. 206.

(t) See post B. 5, ch. 7.

After nonpros for want of declaration, the Defendant is not entitled to his costs, unless the consent rule shall have been entered into, by the Plaintiff; but the proceedings in a second ejectment will be stayed, until such costs are paid (u).

It is ordered, by a late rule (v), that "the time for Plea. "pleading, in every action of ejectment, shall be *eight* days, "exclusive," that is, after service of the notice of declaration; and in default of plea, the Plaintiff, after a proper demand (w), may sign judgment, and forthwith issue a writ of possession, and execution for costs: the Defendant may, however, as in other cases, have a rule for eight days further time to plead, undertaking to go to trial at the following assizes.

The issue is made up, and the record prepared, as in Issue. other cases; and it is provided by a late rule (x), that "every "action of ejectment shall stand for trial, at the assizes next "after issue joined, in case such issue be joined *eight* days " (exclusive), previous to such assizes; unless this Court "or one of the Judges thereof, shall otherwise order."

Although it is not the practice of this Court, in ordinary cases, to give notice of trial for the first assizes, after issue joined, yet in proceeding under the statute 1 Geo. IV., c. 87, s. 2, notice of trial must be given (y): *three* days' notice, however, in such case, has been held sufficient (z).

Where there is a verdict for the Plaintiff, he may have Judgment and a writ of possession, and an execution for costs; or he execution. may have an execution for costs, separately; but where he is nonsuited, for the defendant's not confessing, lease, entry, and ouster, he may have a writ of possession for the

(u) Goodright dem. Ward v. Badtittle, 2. Bl. Rep. 763; Smith dem. Ginger v. Barnardiston, Id. 904. Doe dem. Langdon v. Langdon. Same v. Roe, 5 B. & Adol. 864. Doe dem. Standish & an. v. Roe, Id. 878.

(v) Reg. Gen. [12] Mar. Ass. 5 W. 4.

(w) See ante pa. 175-6.

(x) Reg. Gen. [12] Mar. Ass. 5 W. 4.

(y) Holroyd J. in Doe. dem Charles v. Weatherby, Lan. Mar. Ass. 5 Geo. 4. and see the statute.

(z) Bolland B. Anon. Lan. Aug. Ass. 1832.

lands, but must proceed by attachment, upon the consent rule, for his costs; where, however, the action is brought by landlord against tenant, pursuant to the statute 1, Geo. IV., c. 87, the plaintiff is not to be nonsuited, for such non-confession; but the production of the consent rule will be sufficient evidence of lease, entry, and ouster; and the plaintiff, having complied with the requisites of that Act, may proceed to give evidence of mesne profits (a). When the plaintiff is nonsuited upon the merits, or the defendant has a verdict, the latter cannot have an execution for his costs, but may proceed by attachment upon the consent rule.

SECT. 2.

OF PROCEEDING BY PONE.

Proceeding by
Pone.

We have seen that according to the former practice, when the proceeding in ejectment was commenced by declaration, the lessor of the Plaintiff was required to file and serve the declaration, on or before the first day of Hilary or Trinity Term, or (in the case of an ejectment by landlord against tenant), on or before the third day of February, in order, either to obtain judgment by default, against the casual ejector, at the then next rule day, or to go to trial at the following assizes. Where, however, the plaintiff was too late to proceed by declaration, the practice was to serve a writ of *Pone*, ten days, at least, before the assizes, upon which, as we shall presently see, judgment may be obtained against the casual ejector, in the event of an appearance not being entered within eight days after the first day of such assize; but as by the new rules (mentioned in the last section), a declaration against the casual ejector, may now be filed at any time, without reference to terms; and as an appearance must be entered within fourteen days after service of the declaration, whenever filed, the proceeding by writ of *Pone* is rendered so unimportant, that it is not likely hereafter to engage much of the attention of the practitioner.

(a) See the Act; & see Arch. [by Chitty] 652. Tidd's Pr. [9th Ed.] 1230.

As this proceeding, however, is not absolutely superseded, it may be proper to notice shortly, the rules and practice relating to it.

The writ of *Pone* is an original writ, issued from the Chancery of Lancashire, and made out by the Cursitor, upon written instructions left with him. It is dated on the day of issuing, and is always returnable on the first day of the following assizes. The party issuing the writ, gets it served; and the manner of service is the same as of a declaration, and must be effected *ten* days, at least, before the assizes (b). The affidavit of service must shew, that the tenant had a copy of both the *Pone* and notice (c); and also that the true intent and meaning of the writ and service, were explained to the tenant, before the expiration of the proper time for service (d). The Writ of *Pone*.

If the tenant, or other person admitted to defend, do not appear within *eight* days (exclusive), next after the return of the *Pone*, and enter into the usual consent rule, judgment by default may be immediately entered, by order of a judge, to be made upon the usual affidavit of service (e); or a motion for judgment may be made, at the assizes. In entering up judgment, it is necessary to file a declaration against the casual ejector. Judgment against the casual Ejector.

The other proceedings are the same, as in actions of ejectment commenced by declaration. Further proceedings

The proceedings upon a writ of Error in ejectment, are, Error. with a few exceptions, the same as in other cases. The recognizance of bail in error, must be taken in double the yearly value, and double the costs (f).

- (b) Reg. Gen. Lent Ass. 1751.
- (c) Bayley J. Anon. Lanc. Aug. Ass. 56 Geo. 3.
- (d) Bayley J. Anon. Lanc. Mar. Ass. 3 Geo. 4.
- (e) Reg. Gen. [55] Mar. Ass. 2 W. 4.
- (f) Reg. Gen. [16] Mar. Ass. 2 W. 4.

BOOK 4. CHAP. II.

OF PROCEEDINGS IN REPLEVIN.

Replevin usually commenced in the County Court.

The action of Replevin is generally commenced in the County Court by *Plaint*, and removed into this Court, by writ of *Recordari facias loquelam* (a).

Proceedings in the County Court.

It being usual to enter the plaint in the County Court, before the issuing of the *Recordari*, it may be proper to notice, briefly, the practice of that Court, on such proceeding. The plaint cannot be entered there, until the Replevin is returned, and filed with the Sheriff: but either party may, at, or after the County Court next following the taking of the replevin, file it, and enter the plaint; and if the replevin be granted by one of the Sheriff's deputies, and not returned to the Sheriff, at the Court next after the replevy, either party may, at that or any subsequent Court, move for a rule upon the deputy, to return the replevin and bond, within fourteen days after service of such rule (b). The plaint may be removed, though the Plaintiff has discontinued the action in the Court below (c).

Removal from the County Court.

The cause may be removed from the County Court, by either party, without cause; and by the Plaintiff, without bail, whatever may be the amount of damages: but the Defendant cannot remove it, where the damages are under ten pounds, without first entering into a recognizance (d) pursuant to the statute 34, Geo. III. c. 58, s. 2, for payment of the damages and costs, in case judgment shall pass against him. It sometimes happens that a Defendant

(a) As to the removal of causes to this Court, in general, see post B. 5 ch. 1.

(b) See Woodburn's Pr. of the County Court of Lanc. pa. 37.

(c) 2 Sell. Pr. 161.

(d) As to the nature of such recognizance, its form, and the mode of taking it, see post B. 5, ch. 1.

is desirous of removing the cause, before the Plaintiff has taken any proceeding in the Court below; and in that case there is nothing to shew the amount of damages claimed, and consequently no criterion, whereby to ascertain, whether or not a recognizance is necessary: the practice, however, in such case, is, to enter into the recognizance. Recognizance, when requisite.

The *Recordari* (a form of which, together with the return thereto, is subjoined (e)), is an original writ, directed to the Sheriff—issued from the Chancery of Lancashire—and made out by the Cursitor, upon leaving with him, written instructions, containing the names of the parties, and the name of the attorney issuing the writ—a general description of the goods—the nature of the writ—and the return. The writ is dated, on the day it issues; and was formerly made returnable at the assizes, only: but by a late act (f), it is required to be made returnable, on the first Wednesday in the month next after the issuing thereof, unless in the meantime the assizes shall be holden for this County, and then, on the first or last day of such assizes, as the case may be, next after the issuing thereof. When the writ is sealed, it is delivered to the Sheriff, Writ of *Recordari facias loquelam*.

(e) *Writ of Re. fa. lo. ; and the Sheriff's return thereto.*

William the Fourth, &c. to the Sheriff of Lancashire greeting: We command you, that in full County Court, you cause to be recorded, the plaint which is in the said Court, without our Writ, between A. B. Plaintiff, and C. D. Defendant, of a plea of taking and unjustly detaining divers goods, [cattle], and chattels, of the said Plaintiff, as is said; and that you have that record before our Justices at Lancaster, on [Wednesday], the day of next, under your seal, and the seals of four lawful men of your said County, of those who shall be present at that record, and prefix the same day to the parties, that they be then there, to proceed in that plaint, as it shall be just: and have you there, the names of the aforesaid four men, and this Writ. Witness ourself at Lancaster, the day of [the day of issuing] in the year of our Reign. Holt.

E. F., Attorney.
Return to the above Writ.

By virtue of this Writ to me directed and delivered, I have recorded the plaint within written, between the parties within-named, under my seal, and the seals of [naming the four persons] four lawful men of the said County, of those who were present at the recording thereof, as appears in a certain schedule hereunto annexed. — Sheriff.

Note. The schedule contains the style of the County Court, as of which the plaint is entered—the entry of the plaint—and of the further proceedings.

(f) 1 W. 4, c. 7, s. 9.

and immediately suspends his power; and on the receipt thereof, is generally allowed. Notice of the writ being issued, lodged with the Sheriff, and allowed, must be given to the opposite party: and if the Sheriff refuse to return it, he may be ruled to do so.

Proceedings in this Court.

As the *Recordari* removes the plaintiff only, the proceedings in this Court commence *de novo*; and the Sheriff having made his return, the next step to be taken by the party, is, to file the writ, with the Prothonotary. When this writ was returnable at the assizes only, it must have been filed, by the party suing forth the same, within twenty-one days next after the first day of the assizes, at which it was returnable; or, in default thereof, the opposite party might file it, and issue a *procedendo* to remand the cause; or (being the Plaintiff) might issue a *Capias ad respondendum*, to compel the Defendant's appearance (g). The Defendant was required to appear, within twenty-one days after the return of the *Recordari*; or, in default thereof, the Plaintiff might remand the cause (h).

Filing the *Re. fa. lo.* and entering appearance, &c.

Former practice

Present practice

The former practice is altered, by making the *Recordari*, returnable on the monthly returns, as well as at the assizes; and also, by rule (6) of Aug. Ass., 2, W. IV., whereby it is ordered, "that every appearance to any writ of *Recordari* "*facias loquelam*, shall be entered within *eight* days next "after the day on which such writ shall be made returnable; or in default thereof, that a writ of *procedendo* (i) "may issue, to remand the cause." If, therefore, the Defendant, after removing the cause, is desirous of keeping it in this Court, he must file the *Recordari*, and appear thereto, within *eight* days after its return; or the Plaintiff may, immediately, without any previous notice, or demand of appearance, issue a *procedendo*; and after the cause is once remanded, it cannot be removed again. With respect to a *Plaintiff*, it is not provided, by the new rules, within what time, he must file such writ, to prevent a *procedendo* from issuing; but the safest course is, to file

(g) Reg. Gen. Mar. Ass. 58 Geo. 3.

(h) Reg. Gen. Mar. Ass. 57 Geo. 3.

(i) See form of this Writ post B. 5, ch. 1.

it, within eight days after the return; and he may issue process (j), to compel an appearance.

The Plaintiff must declare within *twenty-eight* days next after appearance entered, otherwise the Defendant may (after a proper demand of declaration) sign nonpros (k), upon which he is entitled to costs (l): but as there is no avowry, it is not the practice to allow double costs, under stat. 11, Geo. II., c. 19, s. 22 (m). After nonpros, the Defendant may either issue a writ *pro retorno habendo*, (which, however, is almost fallen into disuse); or, if the distress was for rent (n), he may make a suggestion on the roll, in the nature of an avowry or cognizance, and proceed to execute an Inquiry, pursuant to statute 17, Car. II., c. 7, s. 2, (which is extended to this Court, by 19, Car. II., c. 5), giving 15 days' notice thereof (o); or he may take an assignment of the replevin bond, and sue thereon, in this Court, in his own name, pursuant to the statute 11, Geo. II., c. 19, s. 23 (p).

There is nothing peculiar in the practice of this Court, as to the form of the pleadings, in replevin. It is usual, however, to state in the declaration, the removal from the County Court (q). The time for the Plaintiff to declare, is, as we have seen, within twenty-eight days next after appearance entered; and "no rule shall issue for further time to declare, unless upon a special application to the Court, or one of the Judges thereof (r)." Notice of declaration must be given, as in other cases (s).

(j) Such process, according to the rule of Mar. Ass. 58, Geo. 3, ante pa. 206, is a *Capias ad respondendum*; and there has been no general rule since the statute 4 & 5 W. 4, c. 62, authorizing the issuing of a Writ of *Summons* for this purpose—and see the 14th Sect. of that Act.

(k) Reg. Gen. Mar. Ass. 58 Geo. 3; and as to such demand see ante pa. 175-6.

(l) *Davies v. James*, 1 T. R. 371.

(m) And see *Lindon v. Collins*, Willes' Rep. 429, & *Gurney v. Buller*, 1 B. & Ald. 670.

(n) See Tidd's Pr. [9th Ed.] 977, as to the meaning of the word "Rent" here.

(o) See the above statutes; and as to the proceedings under them, see Arch. [by Chitty], 671. 1 Saund. Rep. 195. 2 Id. 286. 2 Sell, Pr. 179.

(p) The mode of assigning a replevin bond, and the proceedings thereon, are the same as in the case of a bail bond—see ante pa. 106.

(q) For the form of commencement of a declaration, after a removal from the County Court, see post B. 5 ch. 1.

(r) Reg. Gen. Mar. Ass. 58 Geo. 3.

(s) See ante pa. 120 & seq.

Avowry and other pleadings by a defendant, at what time to be filed.

The general rule of Aug. Ass., 2, W. IV., which provides, that the time allowed to a Defendant to *plead*, shall be eight days (exclusive), is not considered, in practice, to have repealed the previous rule of Mar. Ass., 58, Geo. III. which regulates the time for taking proceedings in replevin, and by which it is ordered, that "the Defendant shall not be compelled to *avow*, or reply to, or otherwise answer any pleading filed by the Plaintiff, until the *rule day* next after the filing of the declaration, plea in bar, or other pleading, on the part of the Plaintiff; nor, in case such rule day shall happen within eight days next after the filing of such pleading, until the second rule day after the filing of such declaration, or other pleading." If the avowry, &c., be not filed within the times above mentioned, the Plaintiff may, after a proper demand (t), sign judgment, and proceed to execute an Inquiry, as in other cases (u).

Several Avowries.

Several avowries or cognizances are not to be allowed, unless a distinct ground of answer, or defence, is intended to be established, in respect of each: for example, avowries for distress for rent, and for distress for damage feasant, are to be allowed; but avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are *not* to be allowed (v). As to the consequence of inserting more avowries than are necessary—see Tit. Costs (w). A rule to avow several matters, must be obtained, in like manner as a rule to plead several matters, in ordinary cases (x); and the avowry must be signed by Counsel.

Pleadings by a Plaintiff, at what time to be filed.

The time allowed for a *Plaintiff* in replevin, to answer any previous pleading, is the same as in other personal actions, that is, until the *rule day* next after the filing of the previous pleading; or, if that happen within eight days after the filing thereof, then until the second rule day (y). But "every Plaintiff in replevin may be entitled to an eight days' rule, for further time to plead in bar, rejoin, or file any other subsequent pleading, the Plain-

(t) See ante pa. 175-6.

(u) See ante pa. 179.

(v) See rule [5] of Hil. T. 4 W. 4. Pleas in bar, in replevin, are also within the rule.

(w) See post B. 5, ch. 22, s. 1.

(x) See ante pa. 128.

(y) See ante pa. 130.

"tiff undertaking to plead issuably, rejoin gratis, and take short notice of trial for the following assizes; and not to bring a writ of error for delay (z)."

The issue must be joined *eight* days (exclusive) before the assizes, to be in time for trial (a); and by rule of March assizes, 2, Geo. IV., (which is confined to actions of replevin), it is ordered, that "whenever an issue shall be tendered in pleading by, or on the behalf of, the Defendant, such Defendant, in case of the Plaintiff's default, shall or may on the last day prescribed by the rules of this Court, for making up issues in time for trial at the then next assizes, add a Similiter to such pleading, and give notice thereof to the Plaintiff's attorney or agent: but that such Plaintiff may, within five whole days next after service of such notice, strike out such similiter, and file and give notice of a demurrer: and that in case the Defendant shall join in such demurrer, then the Plaintiff, his attorney or agent upon the defendant's entering or filing such joinder in demurrer, shall be obliged to accept a notice of executing a writ of Inquiry, at the then next ensuing session of assizes, every such notice being given *two* (b) days (exclusive) before the day of executing such Inquiry."

As both parties in replevin are considered actors, either of them may prepare the record; the Defendant may proceed to trial, without a *proviso* (c); and there can be no judgment as in case of nonsuit (d).

As there is no peculiarity in the practice of this Court, relative to the verdict, costs, judgment, or execution, in an action of replevin, it will be sufficient to direct the practitioner to more enlarged treatises on these, and other subjects, touching replevins; merely repeating, that the stat. 17 Car. 2, c. 7, (which provides certain remedies in this species of action), is extended by stat. 19 Car. 2, c. 5, to the Courts of the Counties Palatine.

(z) Reg. Gen. Mar. Ass. 58 Geo. 3.

(a) See ante pa. 132.

(b) But see ante pa. 179, as to notice of Inquiry.

(c) 2 Saund. 336. c.

(d) Tidd's Pr. [9th Ed.] 762. 2 Sell. Pr. 154.

BOOK 4. CHAP. III.

OF PROCEEDINGS AGAINST BAIL ON THEIR RECOGNIZANCE.

Ca. Sa. against
the principal.

As a preliminary to the proceedings against Bail on their recognizance, a *Ca. Sa.* must be lodged against the principal, and returned *non est inventus*; and may be issued for that purpose, after a levy of part, under a *feri facias* (a).

Issuing teste
and return

The *Ca. Sa.* is sued out as in ordinary cases, and is indorsed "to be returned, *non est inventus*:" but if the Plaintiff knows the Defendant to be in custody, at the time of procuring such return, the proceedings against the bail, will be irregular (b). It must be dated on the day of issuing (c); and as there does not appear to be anything in the recent rules or enactments, to alter the former practice, requiring an interval of *fifteen* days between its teste and return, it will be proper still to allow such interval. With respect to its return, this, it seems, ought to be on a day certain; and may be either a monthly return, or at the assizes (d); for, as it is well observed (e), if the *Ca. Sa.* be made returnable *immediately* after the execution thereof, it is difficult to say when the Sheriff's return is to be called for, or that his return of *non est inventus*, can be said to be an execution of the writ (f).

Lodging with
the Sheriff, &c.

It is necessary that the *Ca. Sa.* should lie in the Sheriff's office, the last *four* days (exclusive) before the return; and Sunday, or other holiday, is not reckoned one of them, for this purpose (g). On the return day, the Sheriff will return the writ, pursuant to the indorsement, on the appli-

(a) *Stevenson v. Roche*, 9 B. & C. 707.

(b) *Briggs v. Richardson*, 2 Dowl. P. C. 158.

(c) Stat. 4 & 5 W. 4, c. 62, s. 33. See ante pa. 43.

(d) See ante pa. 43.

(e) See Chapman's 3rd Addenda to K. B. Pr. pa. 129.

(f) See also Arch. [by Chitty], 441-442-501.

(g) *Howard v. Smith*, 1 B. & Ald. 528. *Furnell v. Smith*, & an. 7 B. & C. 693. *Scott v. Larkin*, 7 Bing. 109.

cation of the party, without having made an attempt to take the Defendant; and the writ when returned, is filed with the Prothonotary. It is not necessary to give the bail notice of the *Ca. Sa.*: and the Plaintiff may, on the day of its return (*h*), proceed against them, either by action of debt, or by *Scire facias*—the former proceeding, however, is the more usual. The extent of the bail's liability is stated in another place (*i*).

The Prothonotary, on being applied to, will enrol the recognizance, and also the judgment in the action against the principal; copies of which records may be had, to enable the Plaintiff to prepare his *Scire facias*, or declaration. Enrolling the recognizance.

Proceeding by Action of Debt.

The proceedings in an action of debt, on a recognizance of bail, must be commenced by writ of *Summons*; for the Defendants cannot be arrested: and as the recognizance is joint and several, the bail may be proceeded against, either together, or separately; though several actions ought not to be brought, without a sufficient reason (*j*). The writ of summons is issued as in common cases; but, in addition to the matters ordinarily required to be indorsed thereon, it is ordered by a late rule (*k*), that such writ "shall be indorsed with a memorandum, stating, that the same is on a recognizance of bail, in a suit against *C. D.*, the Defendant; or, the Defendant "first named in the process, in the original action, and "another, or others, (in case there are more than one)." It is obvious that the former rule of Court (*l*), requiring the process to be served four days before the return, is inapplicable to the Writ of Summons, in which no return day is mentioned. The subsequent proceedings are as in other cases. Action of debt on the recognizance.
Writ of summons.
Indorsement.
Subsequent proceedings.

(*h*) *Shivers v. Brooks*, 8 T. R. 628.

(*i*) See ante pa. 89.

(*j*) See Arch. [by Chitty], 505.

(*k*) Reg. Gen. (10) Mar. Ass. 5 W. 4.

(*l*) Reg. Gen. Mar. Ass. 52 Geo. 3.

Staying proceedings on surrender of the principal.

Although the bail are, in strictness, fixed, immediately on the return of the *Ca. Sa.*; yet, by the indulgence of the Court, they are allowed to render their principal after that time; and it is provided by rule (10) of Mar. Ass. 5 W. IV., that proceedings on the writ of summons "may be stayed, on payment of costs of the writ, and service thereof, and affidavit of such service (if made), in case the Defendant or Defendants in the original action, for whom such bail shall have been given, shall be surrendered (*m*), and notice thereof shall be given, within *eight* days (inclusive) of, and next after, the service or execution of such writ, against the bail."

Rule to stay proceedings after render.

In furtherance of the above provision, it is ordered (*n*), that "upon affidavit of the service of such writ, and of such surrender having been made, and notice thereof given, as in the last rule is mentioned, the Prothonotary of this Court, or his deputy, shall have power to issue a rule *absolute*, to stay proceedings on the recognizance of bail, upon payment of such costs as aforesaid."

Staying proceedings without render.

But proceedings against bail may, in any stage, be stayed, without a render of the principal, on payment of the debt and costs in the original action, and of the costs of the action on the recognizance (*o*), a rule *nisi* for which purpose, may be had from the Prothonotary, and will operate as a stay of the proceedings, from the service, until otherwise ordered.

Staying proceedings pending a writ of Error.

"To entitle bail to a stay of proceedings pending a writ of error, the application must be made, before the time to surrender is out" (*p*).

Proceeding by Scire facias (q).

Scire facias.

The writ of *Scire facias* is made out by the party—tested on the day of issuing—and returnable, on the first

(*m*) As to surrendering a defendant in discharge of bail, see post B. 5, chap. 14.

(*n*) Reg. Gen. (11) Mar. Ass. 5 W. 4.

(*o*) See 2 Sell. Pr. 58.

(*p*) Reg. Gen. (42) Mar. Ass. 2 W. 4.

(*q*) See further as to the Writ of *Scire facias*, and the entry thereon; post B. 5, ch. 24.

or last day of the assizes, or on any of the monthly returns. It is signed by the Prothonotary, afterwards sealed, on a docket obtained from the Cursitor, and then lodged with the Sheriff.

It was formerly the practice to issue two writs of *Sci. fa.*; and to get them both returned *nihil*, without giving the bail any notice; but it was afterwards provided (*r*), that no judgment should be given against bail, upon the return of two *nihil*s, in a proceeding by *scire facias*, without *four* exclusive days' notice, given to the bail, of such proceeding, previous to the return of the *alias scire facias*, verified by affidavit; or without a special order of the Court, or one of the Judges thereof.

When it is intended to sue out one *Sci. fa.* only, there must, it seems, be fifteen days between its teste and return (*s*); and it must be left with the Sheriff, *four* full days before the return; a warrant thereon must be personally served, on each of the bail, by two persons, who should indorse the service on the warrant, and sign their names thereto (*t*).

Upon a proceeding by two Writs of *Sci. fa.*, there must be fifteen days (inclusive) between the teste of the first, and return of the last. The first need not be left in the Sheriff's office four days before the return; but the *alias* must (*t*).

If the principal be surrendered, and due notice thereof given, within *four* days (inclusive) of and next after the return of the *scire facias*, returned *scire feci*, or the *alias scire facias*, returned *nihil*, the proceedings against the bail may be stayed, on payment of the costs of such proceeding; and on such other terms, as the Court, or one of the Judges thereof, shall appoint (*u*). The Prothonotary will grant a rule *nisi* for this purpose, the service of which, operates as a stay of proceedings, until the Court, or a Judge, otherwise order (*u*): and if the rule be not made

(*r*) Reg. Gen. Mar. Ass. 52 Geo. 3.

(*s*) Evans' Pr. C. P. L. 110: but see 2 Sell. Pr. 48.

(*t*) Evans' Pr. C. P. L. 110.

(*u*) Reg. Gen. Mar. Ass. 52 Geo. 3.

absolute, the Plaintiff may take such steps, as of the day whereon the rule *nisi* was obtained (u).

Judgment by default.

Should the principal not be surrendered, as above mentioned, the Plaintiff should file his *entry* with the Prothonotary, *fourteen* full days previous to the rule day, next after the return of the last *sci. fa.*; at which rule day he may sign judgment, and issue execution against the bail (v), either jointly, or separately (w).

Appearance and quashing *Sci. fa.*

An appearance to a *sci. fa.* is entered with the Prothonotary, and notice thereof must be given, as in other cases. After an appearance, the Plaintiff will not be allowed to quash the writ of *sci. fa.*, except on payment of costs (x).

Subsequent proceedings.

The times for taking the subsequent proceedings, are as in other cases (y); and by the law amendment act it is provided, that "in all writs of *scire facias*, the Plaintiff obtaining judgment, on an award of execution, shall recover "his costs of suit, upon a judgment by default, as well as "upon a judgment after plea pleaded, or demurrer joined." (z).

Costs.

(u) Reg. Gen. Mar. Ass 52 Geo. 3.

(v) Evans' Pr. C. P. L. 111.

(w) Sainsbury v. Pringle, 10 B. & C. 751.

(x) Reg. Gen. (59) Mar. Ass 2 W. 4.

(y) As to the declaration and subsequent proceedings, see 2 Sell. Pr. 61.

(z) See stat. 3 & 4 W. 4, c. 42, s. 34, & see Brewster v. Meeks, 2 Dowl. P. C. 612.

BOOK 4. CHAP. IV.

OF PROCEEDINGS AGAINST PRISONERS.

SECT. 1.

Prisoners for debt in the Castle of Lancaster, are considered to be in the custody of the Sheriff; and proceedings against them, in actions *non-bailable*, are the same, as against Defendants at large; but are different in *bailable* actions. Formerly the mode of detaining a Defendant in gaol, upon mesne process, was, by issuing, in the usual way, and lodging with the Sheriff, a bailable writ of *Capias*: but by statute 4 and 5, W. IV., c. 62, s. 7, it is enacted, that "when it shall be intended to detain in any such [that is personal] action, any person being in the custody of the keeper of the gaol for the county of Lancaster, the process of detainer shall be according to the form of the writ of *Detainer*, contained in the schedule to that Act, and marked number 5 (a), and a copy of such process, and of all indorse-

Proceedings
against prison-
ers.

In non-bailable
actions.

In bailable ac-
tions.

Writ of *De-
tainer*.

(c) *Writ of Detainer. as prescribed by the Act.*

William the Fourth, &c. To the Sheriff of Lancashire, greeting: We command you, that you detain C. D., if he shall be found in your custody, at the delivery hereof to you, and him safely keep, in an action on promises, [or, of debt, &c., as the case may be], at the suit of A. B., until he shall be lawfully discharged from your custody: and we do further command you, that on receipt hereof, you do warn the said C. D., by serving a copy hereof on him, that within eight days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him, in our Court of Common Pleas at Lancaster, to the said action; and that in default of his so doing, the said A. B. may declare against him, on or before the third Commission day of the Assizes (exclusive of Sunday) next after his detainer, and proceed thereon, to judgment and execution: And we do further command you the said Sheriff, that immediately after the service hereof, you do return this our writ, or a copy hereof, to our said Court, together with the day of the service hereof. Witness [the Chief Justice of this Court, or in case of vacancy of such office, then one of the other Judges thereof] at Lancaster, the day of [the day of issuing] in the year of our Reign.

N. B. This writ is to be indorsed in the same manner as the writ of *Capias*, but not to contain the warning on that writ.

[The amount of debt and costs must also be indorsed, pursuant to rule of Court—see ante pa. 54-57; and as to the amount of costs—see post Chap. on costs].

"ments thereon, shall be delivered, together with such
 "process, to the keeper of the said gaol, who shall forth-
 "with, serve such copy upon the Defendant, personally, or
 "leave the same at his room; and the declaration there-
 "upon, shall, and may allege the prisoner to be in custody,
 "in the said gaol: and the subsequent proceedings shall
 "be, as against prisoners in custody upon mesne process,
 "according to the practice of this Court, unless otherwise
 "ordered by some rule, to be made by the Judges of the
 "said Court."

Construction of
 the statute 4 &
 5 W. 4, c. 62,
 s. 7.

Since this statute, it is questionable whether the writ of *Capias* can be used, for the purpose of a detainer; for though the above section provides, that when it shall be intended to detain any person in gaol, the process for that purpose, *shall be* a writ of *Detainer*, yet, as the first warning on the writ of *Capias*, states, that "if a Defendant, being in custody, shall be detained on this writ;" or "being arrested thereon, shall go to prison," &c., this would seem to imply, that the *Capias* may be used for the purpose of a detainer.

The different modes of construing the act, with these apparent contradictions are, 1st—to give to the words "shall be," as used in reference to the writ of *Detainer*, a directory, and not a compulsory meaning: 2nd—by construing the word "custody," in the warning on the *Capias*, to mean, the custody of the Sheriff, in contradistinction to that of the gaoler, which distinction prevails in the Courts at Westminster (c): and 3rd—by holding that the warning on the *Capias*, contemplates the case of that writ, when issued against several Defendants, some of whom are in custody, and others at large.

With respect to these several modes of construction, it may be observed,—as to the first, that it seems too much to contend that the words "shall be" as applicable to the writ of *Detainer*, have not a compulsory meaning; besides if they are not peremptory, there would be no occasion for the writ of *Detainer*:—with respect to the second, it may be sufficient to observe, that the distinction upon which

(c) See Atherton's Treat. 22. 29.

it is founded, does not prevail in this Court; for we have seen, that a Defendant in the gaol of this Court, is considered to be in the custody of the Sheriff. The last of the above modes of construction, seems to be the most plausible; for where some of the Defendants are in gaol, and others at large, the writ of Detainer would clearly be inapplicable for the purpose of holding the latter to bail; whereas the writ of *Capias* would not only serve the purpose of arrest, but, without much impropriety, and with no inconvenience, might now, as formerly, be used for the purpose of a detainer.

The writ of detainer issues upon an affidavit of a bail-able cause of action; and is signed, sealed, dated, or tested, in the same manner as a writ of Summons, or *Capias*. It is to be indorsed in the same manner as a *Capias*, but not to contain the warning on that writ: and the consequence of omitting to insert therein, or indorse thereon, any of the matters required, is the same as in the case of a Summons or *Capias* (d). Writ of Detainer, how issued.
Indorsement on

As to the proper manner of executing the writ of Detainer, Execution of. there is some perplexity, occasioned by the language of the 7th section of the statute being different from that of the writ itself, which the statute prescribes: by the one it is required that a copy of the process, with the indorsements, shall be delivered, *with such process*, to the keeper of the gaol, who shall forthwith serve such copy, upon the Defendant, personally, or leave the same at his room; and by the writ, the Sheriff, (to whom it is directed), after being commanded to detain the Defendant, &c., is required, on the receipt of the writ, to warrant him (as therein mentioned) by serving a copy thereof on him: and the Sheriff is also commanded, that immediately after such service, he return the writ, or a copy thereof, to this Court, together with the day of service thereof.

From the writ itself, therefore, it would seem, that it must be lodged with the Sheriff, and that he must execute it, by serving a copy on the Defendant: and the practice is, for the party issuing the writ, to make out a warrant thereon,

(d) See ante pa. 59.

(containing a verbatim copy of the writ) and to leave the writ and warrant with the Sheriff, who transmits them to the gaoler, keeping a copy of the writ, for the purpose of making a return. The gaoler delivers a copy of the writ, to the Prisoner.

Bail. The time for the Defendant to put in bail, is the same as on a writ of *Capias*; and when his object is to get discharged from custody, he should give *four* days (exclusive) notice of perfecting the bail (*e*).

Perfecting bail to obtain a discharge. When a Defendant in custody has put in and perfected bail, according to the practice of the Court, and "no notice" shall be forthwith given to the Prothonotary, by the Plaintiff, or his attorney, of his or their intention to apply, to "some Judge of this Court, against the allowance, the said Prothonotary, or his deputy, shall issue a rule for the discharge of such Defendant (*f*). This rule is absolute in the first instance; and on its being lodged with the gaoler, together with the Sheriff's certificate, that there are no other detainers, the Defendant will be discharged, forthwith.

Declaration. If a Defendant be taken, or charged in custody, upon a writ of *Capias*, and imprisoned for want of sureties, for his appearance thereto, the Plaintiff may declare against him, and proceed thereon, according to the practice of the Court, as against a Defendant in custody, on mesne process (*g*); that is, the Plaintiff *may* declare, at the expiration of eight days, from the execution of such writ, inclusive of the day of such execution (*h*): but if the object in filing the declaration, be, to prevent the Defendant's discharge, for want thereof, then the Plaintiff *must* declare, on or before the third commission day of the assizes, (exclusive of Sunday), next after the detainer, or arrest (*i*). Nonpros, for want of declaration, is due at the same time, as in other cases (*j*).

At what time to be filed.

(*e*) Reg. Gen. Lent Ass. 1793; and see ante pa. 95.

(*f*) Reg. Gen. Lent Ass. 1793.

(*g*) 4 & 5 W. 4, c. 62, s. 4.

(*h*) Id. s. 9; and see the writ of *Capias*; ante pa. 67; and the warning thereon. See also the form of the writ of Detainer; ante pa. 225. and see ante pa. 77.

(*i*) But see post pa. 231 note *w*.

(*j*) See post B. 5. ch. 7.

The declaration begins by stating the Defendant to be a prisoner for debt, in the custody of the keeper of the gaol, for the county of Lancaster; and after a writ of Detainer, it is expressly provided (*h*), that "the declaration thereupon, shall and may allege the prisoner to be in custody, in the said gaol." The form of declaration, except as to its commencement (*l*), is the same, as against Defendants at large.

The declaration must be filed with the Prothonotary; and a copy of it, together with notice thereof, must be delivered to *each* Defendant, or to the gaoler, or turnkey, for him (*m*): an affidavit of such delivery (see form below (*n*)), must be filed with the Prothonotary, on or before the third day of the assizes, next after commitment, or detainer; or in default thereof, the Defendant will be entitled to his discharge (*o*), on entering a common appearance. A copy of the declaration must be delivered to the Defendant, whether he is in custody upon the first process, or is surrendered in discharge of bail (*p*); but such copy need not, it seems, be delivered, unless it be at the suit of the same Plaintiff, for whom the Defendant is in custody, and for the same cause of action (*q*). The particulars of demand must be delivered, with the notice of declaration, as in other cases.

(*h*) 4 & 5 W. 4, c. 62, s. 7. See ante pa. 226.

(*l*) See ante pa. 117, for the form of commencement of a declaration against a prisoner.

(*m*) Reg. Gen. [1] Aug. Ass. 2 W. 4.

(*n*) *Affidavit of delivery of a Declaration, against a Prisoner.*

In the Common Pleas at Lancaster

Between A. B.Plaintiff,
and

C. D.Defendant.

E. F., of maketh oath and saith, that he did on the day of instant, deliver unto G. H., the gaoler [or, one of the turnkeys] of his Majesty's gaol the Castle of Lancaster, a true copy of the declaration and notice hereunto annexed, in order that the same might be forthwith delivered to the said Defendant, pursuant to a rule of this honorable Court: and the said G. H. then acknowledged to this deponent, that the said Defendant was at that time, a prisoner in the said gaol, at the suit of the said Plaintiff.

Sworn &c.

E. F.

Before me, J. K., a Commissioner for taking affidavits in the said Court [or if made during the assizes], "Sworn in open Court at Lancaster, &c. Before" [the Judge].

(*o*) Reg. Gen. 1796.

(*p*) *Clavey v. Watts*, 2 Bl. Rep. 786. And see *Thompson v. Carey*, 1 Chitt. Rep. 720.

(*q*) *Robertson v. Douglas*, 1 T. R. 191.

Further time to declare, when allowed.

A rule for further time to declare against a prisoner, will not be granted, except on special grounds; as where one Defendant only, in a joint action, is in gaol, for want of bail; and the other Defendant has not been met with, or keeps out of the way, to avoid the arrest, so that the Plaintiff cannot declare: under these circumstances, the Court, or a Judge, will grant further time to declare, on its being shewn, that due diligence has been used to arrest the Co-defendant, and that the Plaintiff is proceeding, without delay, to outlaw him (*r*).

Further proceedings.

The further proceedings against prisoners, are the same as against Defendants at large; except that rules, orders, and notices, (not requiring personal service), may be left with the gaoler or turnkey, for the prisoner (*s*); and except that the Plaintiff, if he do not proceed within certain periods, may lose the benefit of bail, as will be shewn in the next section.

SECTION 2.

Superseding prisoners.

The following rules point out the periods, at which a prisoner is entitled to his discharge, for want of the Plaintiff's proceeding against him—

For want of declaration at the Assizes next after commitment.

I. "Wherever a Defendant shall be in gaol (*t*) for want of bail upon mesne process (*u*), and the Plaintiff shall not declare against him, on or before the third day (Sunday excluded) of the assizes (*v*), next after his actual com-

(*r*) *Garth Gent v. Glover & an. Lan. Aug. Ass. 59 Geo. 3. Ellithorn Gent v. Thompson & an. Lan. Aug. Ass. 8 Geo. 4. Knight v. Parker & an. 2 Bl. Rep. 759. & Ames v. Ragg, 2 Dowl. P. C. 35.*

(*s*) *Whitehead v. Barber, 1 Str. 248.*

(*t*) Being in the custody of the Sheriff's officer is not, in practice, considered as being in gaol, within the meaning of this rule.

(*u*) The Prothonotary is authorised by Rule (1) of Mar. Ass. 5 W. 4, to issue, in actions commenced by Summons, *Capias*, and Detainer, all such rules as he was empowered to issue in actions commenced by *Capias ad respondendum*, before the Stat. 4 & 5, W. 4, c. 62.

(*v*) Since the assizes have been holden at Lancaster, and then at Liverpool, the practice has been, to reckon the *third* day, from the commencement of the assizes, at the former place.

"mitment (*w*), the Defendant, in default thereof, shall, at any time after such third day of the assizes, be entitled to a rule for his discharge, upon entering a common appearance (*x*).

II. "Wherever a Defendant shall be taken or committed to gaol, upon mesne process, at or during any assizes (*y*), or shall be surrendered in discharge of bail (before declaration filed), at or before the commencement of any assizes, if the Plaintiff shall not declare, within fourteen days next after service of a rule for that purpose, to be obtained at or after such assizes, the said Defendant shall be entitled to a rule for his discharge, on entering a common appearance.

For not declaring within 14 days.

III. "Wherever the Defendant is in custody at the time of declaration filed, the Plaintiff shall proceed to final judgment, within fourteen days next after service of a rule on the Plaintiff, his attorney or agent, for that purpose, (such rule not to be granted, until the assizes next after such declaration filed): and shall proceed to charge the Defendant in execution, within the Easter term, or Michaelmas term, or within the first five days (Sunday excluded) of the assizes, which may respectively first happen, after the service of such rule.

For not proceeding to final Judgment, &c. where defendant is in custody, when declaration filed.

IV. "In case of a surrender in discharge of bail, after declaration filed, and before final judgment obtained, trial had, writ of Inquiry executed, or rule of Court, or Judge's order obtained, for computing principal and interest, upon any bill of exchange or promissory note, the Defendant shall be entitled to such rule as last aforesaid, at or any time after, the assizes next after such

The like in case of a surrender, after declaration, and before final judgment, &c.

(*w*) But *quære* whether a Defendant is supersedeable under this rule, who is detained in gaol, by process executed within *eight* days previous to the third day of the assizes: See Stat. 4 & 5 W. 4, c. 62, s. 4 & 9; and see also the writ of *Capias*, and the first warning thereon—ante pa. 66-7; and the writ of Detainer ante pa. 225.

(*x*) But a Defendant who has petitioned the Insolvent Court, is not supersedeable, for want of the Plaintiff's proceeding. See post pa. 234.

(*y*) This has been considered, in practice, to mean not only during the five Commission days, but during the time the Court is actually sitting.

Supersedeas.

"surrender, and due notice thereof, unless such surrender, shall have been made within fourteen days next preceding the assizes, (and not falling within the provisions of the next section of these rules), in which case the Defendant shall be entitled to such rule, as last aforesaid, at, or at any time after, the second assizes after such surrender, and notice, as aforesaid.

For not charging in execution, after surrender, at or within 14 days before, the Assizes, and a trial had, or writ of Inquiry executed, at such Assizes, &c.

V. "In all cases of a surrender in discharge of bail, made during an assizes, or within fourteen days next before an assizes, in case a trial shall be had, or a writ of Inquiry executed, at the same assizes; or in case such writ of Inquiry shall have been executed before such assizes, and then returnable (the execution of every such writ of Inquiry, being to be certified gratis, by the undersheriff); or in case final judgment shall be signed at such assizes, or within fourteen days next before such assizes; or in case a rule of Court, or Judge's order, shall be obtained at such assizes, or within fourteen days next before such assizes, for computing principal and interest, upon any promissory note, or bill of exchange; or in case such assizes shall be the second assizes after action brought; the Defendant shall, in the several cases aforesaid, on, or at any time after, the first day of the Easter term, or Michaelmas term, next after such surrender made, and due notice thereof given, be entitled to a rule for his discharge, unless the Plaintiff shall proceed, or shall have proceeded, to charge the Defendant in execution, within fourteen days next after service of such rule on the Plaintiff, his attorney, or agent: if, by the course of the Court, the Plaintiff can so proceed, or could have so proceeded; and in case the proceedings be not stayed, by writ of Error, or Injunction.

The like in case of a surrender after trial, &c.

VI. "In all other cases of a surrender in discharge of bail, made after trial had, or writ of Inquiry executed, (to be certified as aforesaid), or after a rule of Court, or Judge's order, obtained, for calculating principal and interest upon a bill of exchange, or promissory note; or made after the second assizes after action brought; the Defendant shall be entitled to such rule as last aforesaid, on, or at any time after, the first day of the Easter Term,

"Michaelmas Term, or Assizes, next after such surrender, ^{Supersedeas.}
 "and due notice thereof given, in case the proceedings
 "shall not be stayed, by writ of Error, or Injunction (z)."

VII. "In all cases of a surrender in discharge of bail, ^{For not charging in execution, in case of a render after final judgment.}
 "after final judgment, the Defendant shall, on, or at any
 "time after, the first day of the Easter Term, Michaelmas
 "Term, or Assizes, next after such surrender, and due
 "notice thereof given, be entitled to a rule for his dis-
 "charge, unless the Plaintiff shall proceed, or shall have
 "proceeded, to charge the Defendant in execution, within
 "ten days next after service of such rule, on the Plaintiff,
 "his attorney, or agent, in case the proceedings be not
 "stayed, by writ of Error, or Injunction (a).

"If, in any of the cases aforesaid, the proceedings shall ^{At what time the defendant is entitled to his discharge, where the proceedings are stayed by writ of Error, or Injunction.}
 "be stayed, by writ of Error, or Injunction, then the
 "Defendant shall be entitled to any of such rules respec-
 "tively, as aforesaid, (according to the then state of pro-
 "ceedings against him), upon, or at any time after, the
 "first day of the Easter Term, Michaelmas Term, or
 "Assizes, which of the said Terms, or Assizes, shall res-
 "pectively happen, next after the writ of Error shall be
 "non-prossed, discontinued, or set aside, or the Injunction
 "dissolved (b).

"And in default of the Plaintiff charging the Defendant ^{Defendant not entitled to his discharge, if the plaintiff cannot proceed, and could not have proceeded.}
 "with a declaration, or signing final judgment, or charg-
 "ing the Defendant in execution, (to be certified gratis
 "by the undersheriff), pursuant to the above rules, the said
 "Defendant shall, on producing an affidavit of the service
 "of such respective rules, be entitled to a rule absolute
 "for his discharge, on entering a common appearance (if
 "before final judgment), provided the proceedings shall
 "not be stayed, by writ of Error, or Injunction; and in
 "case the Plaintiff can proceed, or could have proceeded,
 "by the course of the Court, so as to comply with the
 "terms of such respective rules." (b)

(z) This, and the 5 preceding regulations, were made by Reg. Gen.
 Aug. Ass., 52, Geo. 3.

(a) Reg. Gen. Aug. Ass., 54, Geo. 3.

(b) Reg. Gen. Aug. Ass., 52, Geo. 3, and Aug. Ass. 54, Geo. 3.

Nor after petitioning the Insolvent Court.

Where a Plaintiff could have proceeded to final judgment, before a rule to proceed is taken out, but after such rule, cannot so proceed, within the time required by it, the Defendant is, nevertheless, entitled to his discharge. If, however, the Defendant shall have petitioned the Insolvent Court, he is not entitled to his discharge, *for want of the Plaintiff's proceeding*, as to any action, for any debt, respecting which, an adjudication in the matter of such petition, might be made (c), even if he has not followed up his petition, by filing his schedule within 14 days, or giving notice to the Plaintiff (d): but he may still, get discharged, *on perfecting bail*, though he may have been remanded by the Insolvent Court.

A prisoner once supersedeable is always so.

When a prisoner is once supersedeable, he is always so, (before execution), as long as he remains *in the same custody, and under the same process* (e); and, therefore, if a declaration, for instance, be not filed in time, the filing of it afterwards, will not prevent his discharge, on account of the Plaintiff's previous default.

Consequence of a supersedeas.

When a Defendant has been superseded before judgment, he is not finally discharged, and may still be taken in execution: but when he is discharged after judgment, for want of being charged in execution, he cannot afterwards be taken in execution, in the same action; nor can he be arrested in an action on the judgment, though he may be taken in execution in such action (g).

Mode of obtaining a prisoner's discharge.

In order to procure a Defendant's discharge, under the preceding rules, it is not necessary to obtain a Judge's order, nor to issue a writ of *Supersedeas*; but the Prothonotary grants a rule; to obtain which, when the supersedeas is for want of a declaration at the assizes, the Defendant must procure, in the first instance, from the gaoler, a certified copy of the warrant of commitment, and the gaoler also states in his certificate, the date of the com-

(c) 7, Geo. 4, c. 57, s. 15; and see 3 Geo. 4, c. 123, s. 11.

(d) *Molyneux v. Browne*, 2, Dowl. P. C. 84.

(e) *Rose v. Christfield*, 1, T. R. 591; and see *Tidd's Pr.* [9th Ed.] 357. Arch. [by Chitty] 741.

(g) 2, Sell. Pr. 41. *Tidd's Pr.* [9th Ed.] 367. *Line v. Lowe*, 7, East 330. *Brown v. Gardner*, 1, Dowl. P. C. 426. *Ismay v. Dewin*, 2, Bl. Rep. 982.

mitment. The copy commitment is left with the Prothonotary, who, after ascertaining that a declaration has not been filed, makes out a rule absolute, as below (h), for the Defendant's discharge, on his entering a common appearance. When the appearance is entered, the Prothonotary certifies the same, at the foot of the rule(h); and on leaving with the gaoler, the Sheriff's certificate of no other detainers, together with the rule, and Prothonotary's certificate of appearance, the Defendant will be immediately discharged. Notice of the appearance should be served on the Plaintiff's attorney, or agent.

For want of a declaration at the Assizes.

When a Defendant seeks to be discharged, for other default than that of not declaring, on or before the third day of the assizes, he must procure a certified copy of the warrant of commitment, as before mentioned: upon production whereof, the Prothonotary will grant a rule, to declare within fourteen days, or to proceed to judgment, or execution, as the case may be. These are, in effect, rules *nisi*, directing that unless the Plaintiff proceed, as therein mentioned, the Defendant will be entitled to his discharge; and a rule absolute is obtained in the manner before mentioned (i), which rule, together with the Prothonotary's certificate of appearance, and the Sheriff's certificate of no other detainers, being left with the gaoler, he will discharge the Defendant.

For other default.

(h) *Rule for a Defendant's discharge, for want of Declaration at the Assizes.*

Clarendon, March Assizes, 6th William the 4th.

C. D.) The day of 1836. The Plaintiff having neglected to
at) declare against the Defendant in this cause, according to the course
A. B.) and practice of this Court, *It is ordered by the Court*, that the
said Defendant be forthwith discharged out of the custody of the Sheriff
of this County, as to this action, on entering a common appearance, at the
Plaintiff's suit. By the Court.

Certificate of Appearance.

I do hereby certify, that the above-named Defendant hath this day entered a common appearance, at the suit of the above-named Plaintiff. Dated the day of 1836. J. F., Deputy Prothonotary.

(i) See ante pa. 233.

Discharge under the Lord's Act.

There is not much that is peculiar in the practice of this Court, relative to the discharge of prisoners, under the Lords' act (j). The prisoner is brought up at the assizes, generally before the Judge on the crown side, at the conclusion of the other business. The Prothonotary makes out a rule to bring the Prisoner to the bar, which rule is left with the gaoler.

By a general rule of this Court, of Sep. Ass. 1796, it was ordered, that the gaoler should receive money payable according to the provisions of the statute 32 Geo. II., and forthwith pay the same to the prisoner.

(j) 32 Geo. 2, c. 28, which Act (except as to its compulsory provisions) is suspended. See Arch. [by Chitty], 744, as to this Act, its alterations by subsequent statutes, and its suspension.

BOOK 5.

OF MATTERS, MISCELLANEOUS, AND INCIDENTAL (a).

CHAP. I.

OF THE REMOVAL OF CAUSES TO THIS COURT.

Causes are removable to this Court, *before judgment*, Removal of causes to this Court. from inferior Courts of Record within the County, by writ of *Certiorari* (b); and from Courts not of Record, by writ of *Recordari facias loquelam, Pone loquelam, or Accedas ad curiam*. When it is intended to remove a cause from the County Court of Lancashire, to the King's Bench, it must first be removed to this Court, and afterwards, *on sufficient grounds*, it may be removed to the King's Bench (c). Causes are also removable hither, *after judgment*, from inferior Courts of Record within the County, by writ of Error; and from Courts not of Record, by writ of False Judgment.

It is proposed, in this chapter, to consider the removal of causes *before judgment*; and it may be observed, that in general, they may be so removed, wherever this Court has a jurisdiction over them, and possesses the same power of administering justice, as the Court below. In what cases removal allowed.

(a) This book comprises those miscellaneous and incidental matters, collateral to a suit, which could not properly be introduced into the previous part of the treatise; and is confined to subjects which are attended with some peculiarity in the practice of this Court: where, therefore, there is no such peculiarity, reference must be made, to the practice of the superior Courts at Westminster, adopting that of the *Common Pleas*, wherever it differs from that of the other Courts at Westminster.

(b) The Writ of *Habeas Corpus* also serves incidentally to remove a cause, from an inferior Court of record; but as this writ is seldom used, except for the purpose of removing a defendant, to this Court, to be rendered in discharge of bail, here, it will be considered in another place. See post B. 5, ch. 14.

(c) *Edwards v. Bowen & an.* 5 B. & C. 206. 7 D. & R. 709, S. C.

In what cases
not allowed.

Where, however, the cause of action is of a trifling amount, as for a debt under *forty shillings*, it is deemed beneath the dignity of a superior Court to entertain cognizance of it; and therefore after a removal in such case, (unless it appear that justice cannot be had in the Court below), the Court above, will either remand the cause, or quash the writ of removal (*d*): neither can any cause (not concerning freehold, or inheritance, or title of land, lease or rent), be removed, otherwise than by writ of error, or attain, from any *inferior Court of Record*, if it appear or be laid in the declaration, that the debt or damage, doth not amount to *five pounds*; and provided there be a Barrister of three years standing, Steward, or Judge, of such inferior Court (*e*).

Removal from
the Borough
Court of Liver-
pool.

A further restriction has been put upon the removal of causes to this Court, before judgment, from the *Court of Passage of the Borough of Liverpool*, for by a late act (*f*), it is provided, that if in any action, thereafter to be brought, in the said Court of Passage, (excepting actions concerning the inheritance, or freehold, or title to land; and except actions of ejectment), it shall appear by the declaration, that the debt, damages, or value of the things demanded, do not amount to the sum of *twenty pounds*, then such action shall not be removed out of the said Court of Passage, into any other Court whatever, otherwise than by writ of Error; or in pursuance of statute 19, Geo. III., c. 70—that is, for the purpose of issuing execution from one of the Courts at Westminster.

At what stage
of the proceed-
ings causes are
removable.

Causes may be removed from inferior Courts, at any time before the Jury have appeared, and one of them is sworn (*g*): but not from Courts of record (except on error or attain), unless the writ of removal be lodged before Issue or Demurrer joined in the cause, so as the same be not joined within *six weeks* next after the arrest

(*d*) *Daniel v. Phillips*, 4 T. R. 499.

(*e*) 21 Ja. 1 c. 23, s. 4, 6; and see 12 Geo. 1. c. 29, s. 3.

(*f*) 4 & 5 W. 4, c. 92, s. 5. This is a public local Act; see sec. 15.

(*g*) See statute 43 Eliz. c. 5, s. 2, which, though confined to the removal of causes to the Courts at Westminster, has been referred to, as a guide on the removal of causes to this Court.

or appearance of the Defendant (*h*). The removal may be effected after interlocutory judgment (*i*) ; but not after verdict, either on an Issue, or Inquiry (*j*) : and the writ of removal should be lodged a reasonable time before the holding of the Court, at which the cause stands for trial, otherwise the opposite party will, it should seem, be entitled to the costs of preparing for trial. In the County Court of Lancashire, a party is generally allowed, in such costs, for summoning witnesses, at any time within six days previous to the Court at which the cause stands for trial ; and by an old rule of that Court, the writ of *Pone*, or *Re. fa. lo.* is required to be lodged three days (exclusive) before the subsequent Court, [that is, the Court at which the cause stands for trial] ; otherwise, the reasonable expenses of witnesses attending such Court will be allowed (*k*).

Before the removal of a cause from the County Court, by a Defendant, it is the practice for him to enter an appearance in such Court, provided an appearance has not been entered for him by the Plaintiff, in the name of the Bailiff who served the process.

Pre-requisites of a removal.
Appearance.

It is enacted by stat. 34 Geo. III, c. 58, s. 2, that "no cause where the cause of action shall not amount to the sum of ten pounds, or upwards, shall be removed, or removable, from any Court of inferior jurisdiction, into this Court, by any writ of *Pone*, *Accedas ad curiam*, *Certiorari*, or otherwise, unless the Defendant, who shall be desirous of removing such cause, shall enter into the like recognizance [as is required on a writ of false Judgment, (*l*)] for payment of the debt, or damages, and costs, in case judgment shall pass against him." This statute extends to actions of tort, as well as debt and assumpsit (*m*). But if the cause of action be, in fact, for less than ten pounds, though the damages in the process and declara-

Recognizance.
When necessary.

(*h*) Stat. 21, Ja. 1, c. 23, s. 2.

(*i*) *Godley v. Marsden*, 6 Bing. 433.

(*j*) *Smith v. Sterling* 3 Dowl. P. C. 609.

(*k*) *Woodburn's Pr. Coy. Co. of Lan.* pa. 51.

(*l*) That is "with two sufficient sureties, such as the Court wherein such judgment is, or shall be given, shall allow of," see post ch. 19 ; and see the form of recognizance, post pa. 240.

(*m*) See *Lee & ux. v. Goodlad*, 4 D. & R. 350.

Recognizance
on removal.

tion, are laid at a sum beyond it, a recognizance is not necessary (m). If a recognizance be not entered into, (when required), a *Procedendo* may be issued (n).

The above act applies exclusively to the removal of causes to this Court, and its language is similar to that of the previous Act of 19 Geo. III., c. 70, s. 6, which relates to the removal of causes to "any superior Court." By both these statutes, a recognizance is necessary, where the cause of action is under *ten* pounds; but by 7 and 8 Geo. IV. c. 71, s. 6, the provisions of the 19th Geo. III. are extended to all actions, where the cause of action shall not amount to *twenty* pounds; and since the 7 and 8 Geo. IV., it has been the practice to enter into such recognizance, on the removal from *Borough* Courts, to this Court, in all cases where the cause of action does not amount to *twenty* pounds; which practice is founded on the assumption, that such removal is regulated by the statute 19, Geo. III. (o).

When not necessary.

A *Plaintiff* may remove his cause (except, as it would seem, from the *Borough* Court of *Liverpool* (p)) without entering into recognizance, although the cause of action may not amount to *ten* pounds: for the statute requires the recognizance to be entered into, by a *Defendant*, only.

Taking the
Recognizance.

The recognizance (the form of which is given below (q)) is taken by the proper officer of the inferior Court, as the town clerk, or undersheriff; and is usually left with such

(m) *Atterborough v. Hardy*, 2 B. & C. 802.

(n) *Lee & ux. v. Goodlad*, 4 D. & R. 350.

(o) But *quære* whether the statute 34 Geo. 3, (and which is not affected by the 7 & 8 Geo. 4), does not apply to the removal of causes from *Borough* Courts.

(p) See *ante* pa. 238.

(q) *Recognizance on removing a cause to this Court.*

Lancashire to wit. A. B. complains of C. D., of a plea of trespass on the case [or as the action may be] to the damage of the said Plaintiff of £9. 19s. 11d. as it is said; and the said C. D. being desirous to remove the above cause into the Court of Common Pleas at Lancaster, pursuant to the statute made in the thirty-fourth year of the reign of his late Majesty King George the third, intituled "an Act to prevent the removal of suits from the inferior Courts, in the County Palatine of Lancaster, into the Court of Common Pleas of the said County Palatine," two sufficient sureties on behalf of the said C. D. to wit, E. F. of in the County of Lancaster, and G. H., of the same place severally acknowledge to owe to the said A. B., the sum of one

officer, at the time of lodging with him, the writ of removal. The statute requires that there shall be *two* sureties; and the practice is, for each of them to acknowledge in one hundred pounds. It does not appear to be necessary for the Defendant to be present at the taking of the recognizance (r); nor is it the practice to give notice thereof: but the officer of the inferior Court, should be satisfied of the sureties' sufficiency.

Having stated the pre-requisites of a removal of causes to this Court, it may be proper to consider more particularly, the various writs for that purpose. Writs of removal.

The writ of *Certiorari* lies, as we have seen, for the removal of causes from the Courts of Record, (as Borough Courts), within the county. It is directed to the Mayor and Bailiffs, &c., or as the case may be, commanding them, that they send distinctly, and plainly, under their seals, the tenor of the record, and proceedings of the plaint, with all things touching the same, by what names soever the parties are called in the said plaint, unto the Justices at Lancaster, at the return thereof. *Certiorari.*

The writ of *Recordari facias loquelam* lies to remove a *Recordari facias loquelam.* plaint, from an inferior Court, when instituted there, *without* writ (s): but it is almost exclusively used for the purpose of removing actions of replevin, from the County Court; and, as the Court of the honour of *Clithero*, has jurisdiction in matters of replevin, suits in that Court, may be removed by *Re. fa. lo.*, to this Court. The form

hundred pounds, of lawful money of Great Britain, *on condition*, that if judgment shall pass against the said C. D. in the said action, then the said E. F. and G. H. shall pay unto the said A. B., the whole debt or damages which he the said A. B. shall recover by such judgment, together with such costs as shall be allowed by the proper officer of the Court, where such judgment shall pass as aforesaid, then this recognisance to be void, or else to be and remain in full force.

E. F.
G. H.

Taken and acknowledged at [Preston], in the said County, }
this day of 1836, before [Undersheriff.]}

(r) Dixon v. Dixon, 2 Bos. & P. 443.

(s) The *Cursitors'* precedent book has the form of a *Pone*, "without our Writ," and formerly many suits under 40s. were removed by *Pone*.

of this writ is given before (*t*), in treating of the proceedings in replevin, and therefore, it will be sufficient to refer to the chapter on that subject.

Pone loquelam. The writ of *Pone loquelam* lies for the removal of a cause from the County Court, when depending there by writ (*u*). It is directed to the Sheriff, and commands him to *put* before the Justices at Lancaster, on the return day, the plaint which is in his Court, by the King's writ (*u*), between the parties, in a plea of debt, [or as the case may be], and (if the writ be issued by the *Plaintiff*), to tell the Defendant, to be then there, to defend his suit. If the cause be removed by the *Defendant*, then the *Pone* commands the Sheriff, that he tell the Plaintiff to be then there, to prosecute his plaint against the Defendant, *if he will*.

Accedas ad curiam.

The writ of *Accedas ad curiam* lies for the purpose of removing causes from other inferior Courts, not of Record, as Hundred or Manor Courts. This writ is directed to the Sheriff, and commands him, that taking with him four discreet and lawful men of his county, in his proper person, he go to the inferior Court, and in open Court there, cause to be recorded, the plaint which is in the said Court, without the King's writ, between the parties, of a plea, &c. : and that the Sheriff have that record, before the Justices at Lancaster, on the return of the writ, under his seal, and the seals of the said four lawful men, of the same county, of those present at that record. The Sheriff grants a deputation upon this writ, which, with the writ, is delivered to the Steward of the Court below, who makes his return (*v*).

Issuing of such writs.

These writs (which are in their nature, original), are issued, of course, from the Chancery of Lancashire, and are returnable in this Court. They are made out by the Cursitor, on leaving with him written instructions, and are afterwards sealed. They are dated on the day of issuing, and were formerly returnable at the assizes only; but as that was the occasion of much delay, it has been provided, by stat. 1, W. IV., c. 7, s. 9, "that all writs of *Pone loque-*

Their teste and return.

(*t*) See ante pa. 215.

(*u*) See note s last page.

(*v*) Evans' Pr. C. P. L. 122.

"*lam, Recordari facias loquelam, Accedas ad curiam*, and all "other writs lawfully issued out of the Chancery of the said "County Palatine of Lancaster, for the removal of Causes "from the inferior Courts of the said County, into the said "Court of Common Pleas, shall be made returnable, on "the first Wednesday in the month next after the issuing "thereof, unless, in the mean time, the assizes shall be "holden for the said County; and if assizes shall be so "holden in the mean time, then on the first or last day of "such assizes, as the case may be, next after the issuing "thereof; and that all such writs, made returnable at any "other time, than according to the provision herein-before "contained, shall be utterly null and void, to all intents "and purposes."

On the delivery of the writ to the Judge, or officer, of the Court below, his power is so effectually suspended, that if he afterwards proceed, he is liable to an attachment, and the subsequent proceedings are void: but to obtain an attachment, it must be shewn that a recognizance (if required by the statute, as before mentioned), has been entered into (*v*). On receipt of the writ, it should be forthwith allowed, and notice thereof must be given.

Effect of lodg-
ing the writ of
removal.

Until the writ of removal is actually returned, this Court has no jurisdiction over the cause; and, in the mean time, any application respecting such writ, (for instance, to quash, or amend it), must be made to the Court of Chancery, out of which it issues: and before the return of the writ, the Defendant cannot file bail, or enter an appearance (*w*).

After the removal of a cause by a *Defendant*, he should, at the return of the writ, or within *eight* days afterwards, file special bail, or enter an appearance, in this Court, according as the action is bailable, or non-bailable, in the Court below. Formerly, it was necessary to move the Court for bail, at the return of the writ: but this is not so now (*x*), and by a late rule (*y*), "every appearance or bail

Proceedings in
this Court after
removal.

(*v*) *Grimshaw v. Emerson*, 1, Dowl. P. C. 337.

(*w*) *Evans' Pr. C. P. L.* 119.

(*x*) *Reg. Gen. Mar. Ass.* 57 Geo. 3.

(*y*) *Reg. Gen.* (6) Aug. Ass. 2 W. 4.

Bail, or appearance, when to be filed, or entered.

"to any writ of *Certiorari*, *Pone loquelam*, *Recordari facias loquelam*, or *Accedas ad curiam*, shall be entered or filed, respectively, within eight days, next after the day on which such writs shall be made returnable; or, in default thereof, a writ of *Procedendo* (z) may issue, to remand the cause." On the removal by a *Plaintiff* of a bailable action, the bail below are immediately discharged; but where a *Defendant* removes the cause, they are not discharged, until bail above be put in and perfected (a). The practice as to bail, after removal, is the same as relates to bail in ordinary cases; and the only difference in the form of the bail piece, is, that instead of stating the Defendant to be delivered to bail on arrest, you say that he is delivered to bail, on a *Certiorari*. The *Plaintiff* may issue process to compel an appearance, which, it would seem, ought now, as formerly, to be a *Capias ad respondendum* (b).

(z) *Procedendo after Certiorari, to a Borough Court.*

William the Fourth, &c. to the Mayor and Bailiffs of our Borough and Town of Liverpool, in our County Palatine of Lancaster, greeting: Whereas by our writ, we lately commanded you, that you should bring the tenor of a record of a certain plaint, which was before you, in our Borough Court aforesaid, without our writ, between *A. B.*, Plaintiff, and *C. D.*, Defendant, in an action on promises, to the damage of the said *A. B.*, of £ [or us in the writ of *Certiorari*] with all things touching the same, before our Justices at Lancaster, at a certain day now past, Nevertheless, for certain causes our Justices at Lancaster aforesaid moving, the tenor of the record and process of the plaint aforesaid, with all things touching the same, we remit to you, commanding, that in the plaint aforesaid, you proceed with all expedition, according to the law and custom of our said Borough Court, our said Writ to the contrary thereof, directing you, notwithstanding. Witness, &c., [as in the writ of *Summons*].

E. F., Attorney.

Clarendon.

Procedendo after a Pone, to the County Court.

William the Fourth &c. to the Sheriff of Lancashire greeting: Whereas by our writ, we lately commanded you, [or "our late Sheriff of the said County,"] that you [or "that he" as the case may be] should put before our Justices at Lancaster, at a certain day now past, the plaint which was in your Court, by our writ [or, if on common plaint "without our writ"] between *A. B.* Plaintiff, and *C. D.* Defendant, in an action on promises to the damage of the said *A. B.* of £ [or as in the Writ of *Pone*,] Nevertheless for certain reasons moving our said Justices at Lancaster, we send you back the said plaint, commanding you, to proceed in the said plaint, with such speed and effect, as of right, and according to the law and custom of the said Court, you ought to proceed. Witness &c. [as in the writ *Summons*.]

E. F., Attorney.

Clarendon.

(a) *Taylor v. Shapland & ano.*, 3, Maule & S. 328.

(b) Ante pa. 217—note j.

It is not necessary to demand bail, or appearance, previous to issuing a *procedendo*; nor to take out a rule, or order, for such writ to issue, as in the Courts at Westminster. The *procedendo* is a judicial writ, made out by the party, signed by the Prothonotary, afterwards sealed on a docket obtained from the Cursitor, and lodged in the Court below, where the proceedings are afterwards carried on, as if the cause had not been removed; and when once the cause has been remanded, it cannot be again removed, before judgment. If the cause be removed after issue joined in the County Court, a notice of trial is necessary after it is remanded (c). The costs incurred in this Court, abide the event.

Procedendo in default of bail, or appearance.

A Plaintiff is not, in all cases, obliged to follow a Defendant, to the Court above. Whether so bound or not, depends upon the nature of the writ of removal. The general rule is, that where by such writ, each party has a day in Court, and the Defendant may be damnified by not appearing, he may appear, and demand the Plaintiff (d). Hence, as the writ of *Certiorari* prefixes no day for the parties to proceed, but merely requires that the record and process shall be returned, the Plaintiff is not bound, upon such writ, to follow the Defendant; nor, consequently, can the latter sign judgment of nonpros, for want of declaration (e). But by the writ of *Re. fa. lo.*, both parties have a day appointed, and therefore, after a removal by that writ, the Defendant is entitled to nonpros, for want of declaration (f). On a removal by *Pone*, a day is also prefixed to the parties (g); but if such Writ be issued at the instance of a Defendant, the Plaintiff, we have seen, may prosecute his plaint, if he will (h). With respect to the writ of *Accedas ad curiam*, it is observable, that the form of it, as used for a removal to this Court, does

In what cases a Plaintiff is bound to follow a Defendant to this Court.

(c) Woodburn's Pr. Co. Court of Lanc. pa. 52.

(d) Davies v. James, 1 T. R. 371.

(e) Clerk v. the Mayor of Berwick, 4 B. & C. 649. 7 D. & R. 104, S. C.

(f) Davies v. James, Supra.

(g) See Seers v. Turner, 2 Ld. Ray. 1103. 1 Tidd's Pr. [9th Ed.] 414. Evans' Pr. C. P. L. 122.

(h) Ante pa. 242.

not contain a clause prefixing a day to the parties, as the like writ does, when used for a removal to one of the Courts at Westminster (h). This may be an error of omission; but so long as the present form of writ is used, a Plaintiff would not, according to the rule above stated, be obliged to follow a Defendant to this Court, after a removal by *Accedas ad curiam*.

Nonpros for
want of decla-
ration.

When the Plaintiff is bound to follow the Defendant, (except in replevin) nonpros for want of declaration may be signed, at the rule day, after the assizes, next following the time of entering the appearance, or filing bail, as in other cases (i); and the Defendant is, consequently, entitled to costs. A rule for further time to declare, may be had, of course, in all cases after removal, except Replevin, wherein, as we have seen (j), it cannot be had, without a special application to the Court, or one of the Judges thereof.

Declaration and
pleading.

It is said that a declaration, after removal, cannot be filed before appearance, or bail (k). It is usual to state in the declaration, the removal, from the Court below, a form of which is suggested in the note (l). The time for de-

(h) See *Fitz. N. B.* 42, and *Tidd's prac. forms* [6th Ed.] 668.

(i) See post Ch. 7, and as to nonpros in Replevin, see ante pa. 217.

(j) Ante pa. 217.

(k) *Evans' Pr. C. P. L.* 120; but it would seem that after process has issued to compel an appearance, the Plaintiff may appear for Defendant, and proceed as in other cases.

(l) *Commencement of a declaration after a removal.*

In the Common Pleas at Lancaster

The day of in the year of our Lord

Lancashire to wit }
Division. } A. B. lately in the County Court of Esquire,
Sheriff of said County, holden at the Sessions Hall, in Preston, in and
for the said County, on Tuesday, the day of in the
year of the Reign of our Sovereign Lord William the Fourth, by the
grace of God, of the United Kingdom of Great Britain and Ireland, King,
Defender of the Faith, and in the year of our Lord one thousand eight
hundred and thirty-six Before and then Suitors of the said
Court, [by virtue of a writ of Justices, of our said Lord the King, to the
said Sheriff directed,] complained against C. D., of a plea that he render
to the said A. B., £. which to him he owes, and unjustly detains [or
as the action may be]: which said plaint, at the petition of the said C. D.,
is, by his Majesty's writ of *Pone loquelam* returnable here, on [Wednes-
day] the day of in the year of the reign aforesaid,
according to the form of the Statute in that case made and provided, had
here, this day; and now, here, come as well the said A. B., (the plaintiff,)
by E. F., his Attorney, as the said C. D., (the defendant), by G. H. his
Attorney; and the plaintiff, by his said Attorney, complains: For that
whereas, &c.

claring, pleading, and joining of Issue, (except in replevin) is the same as in other cases. The pleadings commence *de novo*, and the parties are not obliged to declare, or plead, as in the Court below (m).

As one of the pre-requisites of a trial before the Sheriff, under the statute 4 and 5 W. IV, c. 62, s. 20, is, that there must be writ of *Summons*, it seems, that this Court has no power, under that act, to direct a trial before the Sheriff, of a cause removed (n). Trial before the Sheriff not allowed.

The costs in the inferior Court, are costs in the cause: Costs. and, at the termination of the suit, are taxed by the officer of such Court, who grants his allocatur thereof. After a removal by a *Defendant*, though the verdict in this Court be for less than forty shillings, yet the Plaintiff is entitled to full costs, provided he would have been so entitled, in the inferior Court: because, having made his election to sue in that Court, where he would have had such costs, the Defendant cannot deprive him of such advantage, by removing the cause (o). But in a cause removed, this Court, it seems, has no power to grant the Defendant his costs, under 43, Geo. III. c. 46, s. 3, on the ground of his having been arrested, without probable cause, for more than the sum recovered (p).

It is provided by the 14th section of the statute, 4 and 5 W. IV., c. 62, that "nothing in that act contained, shall extend to any cause removed into this Court, by writ of *Pone loquelam, Accedas ad Curiam, Certiorari, Recordari* Stat. 4 & 5 W. 4, c. 62, how far it extends to causes removed." *"jacias loquelam, Habeas Corpus, or otherwise."* This provision, taken literally, may seem to exclude the parties to a removed cause, from those advantages given in some of the subsequent sections of the statute: for example, in making writs of Inquiry returnable on any day certain—in obtaining immediate execution after Inquiry—in serving the writ of Subpœna out of the County, &c. It is con-

(m) Evans' Pr. C. P. L. 120.

(n) See also the 14th sect. of the statute 4 & 5, W. 4, c. 62, *supra*; and see post Ch. 10.

(o) Hull. Costs 38. *Archbishop of Canterbury v. Fuller* 1 Ld. Ray 395.

(p) *Costello v. Corlett*, 4 Bing. 474. *Handley v. Levy*, 8 B & Cr. 637. *James v. Dawson*, 1 Dowl. P.C. 341. *Connel v. Watson*, 2 Id. 139.

ceived, however, that this could not have been the intention of the makers of the act; and it is submitted that the above section being in *pari materia* with the 19th section of 2 W. IV., c. 39, must have a similar application to the latter, which clearly excludes removed causes from the operation of those provisions *only*, relating to process for the commencement of actions, and the times of declaring and pleading. It may fairly be urged, therefore, that the 14th section of the 4 and 5 W. IV., c. 62, is to be confined to the previous sections of that act: besides, if it were held to apply to the following sections, which are couched in unqualified language, the consequence would be a *pro tanto* repeal of them, whereas those sections "*as they speak the last intention of the makers*" (q), must, according to a well recognized rule of interpretation, stand uncontrolled by the exclusive language of the 14th section (r).

(q) See Att. Gen. v. the Chelsea Water Works Company, Fitzgibbon 196. 2 Darris on Stat. 675.

(r) See the Judgment in Rex v. the Justices of Middlesex 2 B. & Adol. 818.

BOOK 5. CHAP. II.

OF THE REMOVAL OF CAUSES FROM THIS COURT.

Causes are removable from this Court to the King's Bench, *before judgment*, by writ of *Certiorari*: though it seems to have been formerly held, that such writ did not lie to Counties Palatine, in civil cases (*a*). A *Certiorari*, however, for this purpose, can only be obtained on a special application, *upon sufficient grounds*; such, for example, as would entitle the party to a trial at bar. (*b*)

When removal from this Court allowed.

The *Certiorari* (*c*), issues from the Court above, is directed to the Chancellor of the County Palatine, and upon being left with the Cursitor, he makes out a *mandate* thereon, which is delivered to the Prothonotary, who transcribes the proceedings; for, from the County Palatine Courts, a *transcript* of the record is removed, and not the record itself (*d*). The mandate is returned by the Prothonotary, and, together with the transcript, is then delivered to the Cursitor, who, in the name of the Chancellor, makes a return to the *Certiorari*, and transmits the same, with the transcript, to London, to be filed in the King's Bench, in which Court, the proceedings begin *de novo*.

The writ of *Certiorari*, and proceedings thereon.

A cause may be removed from this Court, to any of the Courts of record at Westminster, for the purpose of issuing an execution therefrom (*e*): or of charging a Defendant in

Removal for particular purposes.

(*a*) See Tidd's Pr. [9th Ed.] 399.

(*b*) Zinck v. Langton, Doug. 721. Jones v. Davies & ors., 1 B. & C. 143, Edwards v. Bowen & an. 5 B. & C. 206. 7 D. & R. 709, S. C. See also 10 Wentworth's, plead. 333, (note); and in what cases a trial at bar will be granted, see Tidd's Pr. (9th Ed.) 748; Arch. [by Chitty], 318.

(*c*) See form of this Writ, 10 Wentworth. 333. Lees' Dict. of Pr. Tit. "*Certiorari*". Tidd's Prac. Forms, [6th Ed.] 153.

(*d*) See Tidd's Pr. (9th Ed.) 401.

(*e*) See statute 33 Geo. 3, c. 68, s. 1: post ch. 25.

execution, when a prisoner there (*f*), or of surrendering him, in discharge of his bail in this Court, when he has become such prisoner (*g*). In the two latter cases, the *Certiorari* is issued from the Court of which the Defendant is a prisoner: and in all these cases, the grounds of the application for such writ, must be shewn, by affidavit.

(*f*) See Tidd's Pr. (9th Ed.) 400. 33 Geo. 3, c. 68, s. 1; and *Jordan v. Cole*, 1 H. B. 532.

(*g*) See post ch. 14; but see *Paterson v. Reay*, 2 D. & R. 177.

BOOK 5. CHAP. III.

OF PARTICULARS OF DEMAND AND SET-OFF.

SECT. 1.

PARTICULARS OF DEMAND (a).

Before the 9th general rule of August assizes, 2, W. IV., Particulars of demand, was by a Judge's order: but by that rule it is provided, that "when a declaration shall contain counts in

"*indebitatus assumpsit*, or *debt*, on *simple contract*, the Plaintiff shall deliver, with the notice thereof, full particulars of his demand, under those counts, when such particulars can be comprised within *three folios*; but if the same cannot be comprised within three folios, he shall deliver such a *statement* of the nature of his claim, and the amount of the sum, or balance, which he claims to be due, as may be comprised within that number of folios." By this rule, therefore, the Plaintiff should,

When to be delivered with notice of declaration.

deliver a particular, or statement, in the cases above mentioned, without an order for that purpose, whether the Defendant has appeared or not. It has not been determined whether a noncompliance with the rule, affords a ground for setting aside, for irregularity, the notice of declaration (b): but to secure the delivery of particulars, the above rule further directs, that "if any notice of declaration shall be delivered without such particulars, or such statement, as aforesaid, and a Judge shall afterwards order a delivery of particulars, the Plaintiff shall not be allowed any costs, in respect of any rule, summons, or order, obtained for the delivery of such particulars; or of the particulars he may afterwards deliver."

Consequence of non-delivery with notice of declaration.

(a) As to particulars of *demand*, in general, in what cases they will be ordered, and what they should contain; see Tidd's Pr. [9th Ed.] 596. Arch. (by Chitty), 875 & seq.

(b) But see Chitty's Gen. Prac. vol. 3, part 6, pa. 613, note c.

Rule nisi, and order for particulars of demand.

Notwithstanding this general rule, a Defendant may now, as formerly, obtain an order for particulars, either before declaration, or (if they are not delivered with the notice thereof) afterwards. Until lately, a rule *nisi*, for this purpose, could not be had before appearance; but now, "a rule for particulars, and order thereon, may be obtained by a Defendant, *before appearance*, and may be made (if the Judge think fit) without the production of any affidavit (c)." It is not the practice of this Court, to impose upon the Defendant, on taking out such rule, the condition of pleading *issuably*, as is required by the practice of the King's Bench.

The rule *nisi* for particulars of demand, requires the Plaintiff to shew cause, why he should not deliver them, with dates, to the Defendant's attorney, or agent; and why, in the mean time, all proceedings in the cause, should not be stayed. This rule is obtained from the Prothonotary (d), without any affidavit; a copy of it is served on the Plaintiff's attorney, or agent; and the rule, together with an affidavit of service, is transmitted to an agent in London, or on the circuit, (if the Judges be on the circuit), for an order. It is not the practice to obtain a rule upon the order, but to serve a copy of the order itself.

Effect of an order for particulars of demand.

The service of the rule *nisi* does not operate as a stay of the Plaintiff's proceedings; but after service of the order, he cannot proceed until the particulars are delivered. The Defendant is also, it seems, precluded from proceeding; and cannot consequently, sign nonpros for want of declaration, so long as such order is in force, and not complied with (e); unless the order reserves to him the liberty to sign nonpros, if the particulars are not delivered within a certain time (f).

(c) Reg. Gen. [23] Mar. Ass. 2 W. 4.

(d) Reg. Gen. Mar. Ass. 57 Geo. 3.

(e) Burgess v. Swayne, 7 B. & C. 485. Somers v. King, 7 D. & R. 125. Sutton v. Clarke, 1 Dowl. P. C. 259. Kirby v. Snowden, 4 Dowl. P. C. 191.

(f) See Arch. [by Chitty], 877.

If the Defendant be dissatisfied with the particulars, whether they be delivered in pursuance of the general rule of August assizes, 2, W. IV., or under a Judge's order, he may obtain from the Prothonotary (*f*), without any affidavit, a rule *nisi* for further particulars, and procure an order thereon, as before mentioned; but when the application is made after a statement has been delivered, as required by such general rule, (full particulars having been delivered previous to the action), the order for further particulars, will, it seems, be upon payment of costs (*g*).

If the particulars delivered be incorrect, the Plaintiff must apply for leave to amend them; for if he deliver a second particular, without an order for that purpose, he cannot give evidence of any claim contained in it, which was not in the first particular (*h*). A Plaintiff may obtain from the Prothonotary, a rule *nisi* to amend his particulars, on payment of costs (*i*); an order upon which may be procured, as in other cases.

It is ordered by the 12th rule of Aug. Ass., 2 W. IV., that "A copy of the particulars of demand, and also of the particulars (if any) of the Defendant's set-off, shall be annexed by the Plaintiff's attorney, to every record at the time the cause is entered for trial." This rule is similar, in terms, to one lately made in the Courts at Westminster; and seems to have been adopted, without advertg to the peculiar practice of this Court, which is, to leave with the Marshal, on the entry of the cause, the paper pleadings, and not the record: as the object of this rule is, doubtless, to apprise the Court of the nature of the claim; and as it would serve little or no purpose, to annex the particulars to the record, which is kept by the Prothonotary, the practice is, to affix them to the paper pleadings, and not to the record. Although the above rule directs the Plaintiff's attorney, only, to annex the particu-

(*f*) Reg. Gen. Mar. Ass. 57 Geo. 3.

(*g*) James v. Child, 2 Tyr. 302. 2 Cr. & J. 252, S. C.

(*h*) Brown v. Watts, 1 Taunt. 353.

(*i*) Reg. Gen. Aug. Ass. 54 Geo. 3.

lars, yet it would seem to be equally within the object of the rule, that they should be annexed by the *Defendant's* attorney, when he brings on the cause to trial, by proviso.

The particulars annexed to the record, or paper pleadings, should be the same as were delivered in the cause; and where this was not the case, and the Plaintiff obtained a verdict upon an item not included in the particulars delivered, the Court granted a new trial; but refused to nonsuit the Plaintiff, because the Defendant was not in a condition to raise the question on the trial, and the point was not then reserved (*j*).

SECT. 2.

Particulars of Set-off.

Particulars of set-off. Particulars of set-off, like those of demand, were formerly obtained only by a Judge's order: but it was afterwards provided (*k*), that there should be subjoined, or annexed, to every *notice of set-off*, a full particular of such set-off, if within three folios; or a statement of the nature of the set-off, if it exceeded that length.

To be delivered with notice of plea. But as the notice of set-off, is superseded by the general pleading rules of Hil. T. 4 W. IV., which require a *set-off* to be *pleaded*, the particulars thereof must be delivered with the *notice of plea*, it being provided (*l*), that "when any Defendant or Defendants shall plead a set-off, he or they shall, with the notice of such plea, deliver a full particular of such set-off, when the particulars can be comprised within three folios; but if the same cannot be comprised within three folios, the Defendant or Defendants, shall deliver such a statement of his or their set-off, as may be comprised within that number of

(*j*) *Morgan v. Harris*, 2 Tyr. 385. 1 Dowl. P. C. 570, S. C. 2 Cr. & J. 461, S. C.

(*k*) Reg. Gen. (10) Aug. Ass. 2 W. 4.

(*l*) Reg. Gen. (11) Aug. Ass. 2 W. 4.

"folios." "And in order to secure the delivery of the particulars of set-off, it is ordered, that if any notice of plea of set-off shall be given, without such particulars, or statement, as aforesaid, the Defendant shall be precluded from giving any evidence of his set-off."

Further particulars of set-off may be obtained in the same manner as further particulars of demand: and particulars of set-off may be amended, in like manner. The Prothonotary is empowered to grant a rule nisi for each of these purposes (m). Further particulars and amending particulars.

As to annexing a copy of the particulars of set-off to the record, see ante pa. 253. Annexing to record.

(m) Reg. Gen. Mar. Ass. 57 Geo. 3. Aug. Ass. 54 Geo. 3.

BOOK 5. CHAP. IV.

OF STAYING PROCEEDINGS ON PAYMENT OF DEBT AND COSTS.

Rule nisi to
stay proceedings

The Prothonotary is empowered to issue a rule to shew cause, why proceedings should not be stayed, "on the Defendant undertaking to pay a certain sum, at a certain day, (to be specified in such rule), as the debt for which the action is brought, and costs; and in default of payment on such day, the Plaintiff to be at liberty to proceed in the action (a)."

Terms of the
rule.

By taking out this rule, the Defendant undertakes (though such undertaking is not expressed therein) that in case it be *not* made absolute, he shall not bring a writ of Error for delay: and the Plaintiff shall be put in the same situation (with respect to any rules, notices, or pleadings) as he was in, at the time of obtaining such rule to shew cause; and may also take such steps, as of the day on which such rule was so obtained, unless otherwise ordered by the Court, or a Judge (a).

It has also been provided (b), that "whenever a Defendant shall take out a rule to stay proceedings, on payment of debt and costs, he shall undertake and agree by *such rule*, that in case the same shall be made absolute, and the debt and costs shall not be paid at the time mentioned in the rule, the Plaintiff shall be at liberty to sign final judgment for the amount of such debt and costs, in the same manner as if the Defendant had actually given a *Cognovit actionem*, for the amount of such debt and costs."

At what time
the rule may
be had.

Such rule may be had immediately on the Defendant's being arrested, or served with process; and as well before filing Special bail, or entering a common appearance (c), as after. The service operates as a stay of the Plaintiff's proceedings, until otherwise ordered (c).

(a) Reg. Gen. Mar. Ass. 52 Geo. 3.

(b) Reg. Gen. Mar. Ass. 11 Geo. 4.

(c) Reg. Gen. Mar. Ass. 52 Geo. 3.

If the Plaintiff oppose the rule, on the ground that more is owing than is stated therein, the Judge will dismiss the application; for he cannot stay the proceedings in such case, even if it appear that *no* debt is due (*d*): but if the Defendant afterwards pay the like amount into Court, and the Plaintiff take it out in full, the latter will not only be deprived of the costs, subsequent to the first offer, but the costs consequent on his first refusal, will be allowed to the Defendant, unless some satisfactory reason be given for such refusal (*e*). Where the rule is discharged, and the Plaintiff in consequence of its staying his proceedings, is prevented from making up the issue in time for trial, he may still file his pleadings, as of the day on which the rule nisi was obtained, and will be allowed to enter his cause, *on motion*, though the usual time for entry has expired.

Discharging the rule.

The Judge will sometimes grant an order upon terms only, such as obliging the Defendant to allow a set-off to be deducted from the Plaintiff's demand, and not to bring an action for such set-off (*f*): or, if the action be against the acceptor of a bill of exchange, by directing the Defendant to pay the costs of other actions, on the same bill (*f*).

On an order being obtained, the Prothonotary, makes out a rule absolute, which, with an appointment to tax, must be served on the Plaintiff's attorney, or agent; and if the debt and costs be not paid, on the day fixed by the rule, the Plaintiff may, on the day following, issue an execution.

Rule absolute, and proceedings thereon.

It is stated elsewhere, when and how proceedings may be stayed, in actions on bail bond (*g*), and recognizance of bail (*h*).

(*d*) *Smith v. Curtis*, 2 Dowl. P. C. 223.

(*e*) *Hale v. Baker*, Id. 125. And see *Chapman's Pr. K. B.* [2nd Ed.] 396. Arch. (by Chitty), 843.

(*f*) *Jones v. Shepherd*, 3 Dowl. P. C. 421.

(*g*) Ante pa. 109 & seq.

(*h*) Ante pa. 222.

BOOK 5. CHAP. V.

OF PAYING MONEY INTO COURT.

Paying money
into Court.

The practice touching the payment of money into Court, in satisfaction of the Plaintiff's claim, has lately undergone considerable alteration, both as regards the kind of actions in which such payment is allowed, and also the proceedings, on paying the money into Court.

In what cases
allowed, for-
merly.

Formerly, the payment of money into Court, in ordinary cases, was confined to actions wherein the sum demanded was either certain, or capable of being ascertained by mere computation : for where the action was for damages, uncertain in their nature, whether arising from a breach of contract, or from a wrong done, money could not be paid into Court.

At present.

But by the law amendment act (a), a power is given of paying money into Court, in *all personal actions*, except such as are therein mentioned ; which provision, has since been extended to this Court, by statute 4 and 5 W. IV., c. 62, s. 23, which enacts "that it shall be lawful for "the Defendant, in all personal actions (except actions for "assault and battery, false imprisonment, libel, slander, "malicious arrest or prosecution, criminal conversation, "or debauching of the Plaintiff's daughter or servant), by "leave of the said Court of Common Pleas at Lancaster, "or one of the Judges thereof, to pay into Court, a sum of "money by way of compensation or amends, in such "manner, and under such regulations, as to the payment "of costs, and the form of pleading, as the Judges of the "said Court shall, by any rules or orders, by them to be "from time to time made, order, and direct."

Mode of paying
money into
Court.

The mode of paying money into Court has also been altered. By the former practice, when such payment was

(a) 3 & 4 W. 4, c. 42, s. 21.

PAYING MONEY INTO COURT.

1
4
2
20

intended, it was necessary to take out a rule for that purpose, which was granted by the Prothonotary, of course, without any affidavit; and the form thereof was required to be the same as that which was used in the Court of Common Pleas at Westminster (b). The Defendant was required to undertake, by such rule, to pay the costs; and in case of nonpayment within two days (exclusive) after the taxation, to suffer the Plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment, for nominal damages (c). Such rule was usually taken out at the time of pleading; but after plea, the Defendant might obtain from the Prothonotary, a rule absolute, for leave to withdraw a special plea, on payment of costs, and plead the general issue, either with or without a notice of set-off, or paying money into Court, or both: or for leave to withdraw the general issue, on payment of costs, and plead the same *de novo*, with a notice of set-off, or paying money into Court, or both: or with liberty to pay a further sum into Court; the Defendant, in either case, undertaking to plead issuably, rejoin gratis, and take short notice of trial, for the following assizes; and not to bring a writ of Error for delay (d).

Former practice

It was also provided by rule (37) of Mar. Ass. 2 W. IV., that "where money is paid into Court in several actions, which are consolidated, and the Plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others, up to the time of paying money into Court."

The present practice, on paying money into Court, is in conformity with that of the Courts at Westminster, as regulated by the general pleading rules of Hil. T. 4 W. IV., whereby it is ordered (by the 17th rule) that when money is paid into Court, such payment shall be pleaded in all cases; and as near as may be, in the form (e) prescribed by such rule, *mutatis mutandis*. But, though such 17th rule has been adopted in this Court, so far as

Present practice

Plea of payment

(b) Reg. Gen. Aug. Ass. 57 Geo. 3.

(c) Reg. Gen. (27) Mar. Ass. 2 W. 4.

(d) Reg. Gen. Mar. Ass. 52 Geo. 3

(e) See the form on the next page.

Under Stat. 4 &
5 W. 4 c. 62, s. 23

respects the payment of money into Court, in ordinary cases, yet having been made prior to the statute 4 and 5 W. IV., c. 62. it was considered doubtful, whether it was applicable to the cases newly provided for, by the 23rd sect. of that act, the language of which contemplates some rules to be made thereafter; and to remove this doubt, it was declared by rule (2) of Mar. Ass. 6 W. IV., that "in cases of payment of money into Court, by a Judge's order, under 4 and 5 W. IV., c. 62, s. 23, such payment shall be pleaded, as near as may be, in the form subjoined" (e).

Since the above rules, it has been held, that unless payment be pleaded, the Defendant will not be entitled to costs, though he has paid into Court sufficient (f)—that the form prescribed, must be adopted, or the plea will be bad (g) and that payment into Court must be pleaded last, and as to the residue, after all the other parts of the demand are exhausted (g). The Defendant may plead payment into Court, on a particular count, so as to enable him to recover the costs of defence as to the other counts, if abandoned, or not proved (h): but where he pleads payment into Court generally, upon the whole declaration, and then pleads other pleas to all except as to the sum so paid, and the Plaintiff takes the money in full satisfaction, and taxes his costs, the cause is at an end,

(e) *Form of plea as prescribed by rule 17 of Hil. T. 4 W. 4, and which, with the exception of the parts within brackets, is also directed by Reg. Gen. (2) of Mar Ass. 6 W. 4, to be used in cases under stat. 4 & 5 W. 4, c. 62, s. 23.*

[In the Common Pleas at Lancaster.]

The day of
C. D.) "The Defendant by his attorney (or "in
ats.) person," &c.) says that the Plaintiff ought not further to main-
A. B.) tain his action, because the Defendant now brings into Court
the sum of £ ready to be paid to the Plaintiff; and the Def-
endant further says, that the Plaintiff has not sustained damages [or in
actions of debt, "that he is not indebted to the Plaintiff"] to a greater
amount than the said sum, [&c.] in respect of the cause of action in the
declaration mentioned, and this he is ready to verify, wherefore he prays
judgment, if the Plaintiff ought further to maintain his action."

(f) *Adlard v. Booth*, 1 Bing. N. C. 693.

(g) *Sharman v. Stevenson*, 3 Dowl. P. C. 709. *Coates & Co. v. Stevens*, Id. 784; see further as to this plea, *J. Chitty, Jun. plead. part 1*, p. 369. *Bosanquet's rules*, p. 40; and *Forms Id.* 97-107-122.

(h) *Early v. Bowman*, 1 B. & Adol. 889. *Clarke v. Nicholson*, 6 Car. & P. 712. *Churchill v. Day*, 3 Man. & R. 71.

and the Defendant has no right to the costs of the other pleas, nor can he sign nonpros for want of a replication (i).

In conformity with the practice of the Courts at Westminster, no rule or Judge's order is necessary, except under the statute 4 and 5 W. IV., c. 62, s. 23; and in that case, such order must be obtained, on a Summons, the application for which, should be supported by an affidavit of facts, and production of the declaration. The money is paid to the Prothonotary, at the time of filing the plea.

Rule to pay money into Court when necessary.

Where it is advisable to pay money into Court, *after* Amending plea. plea, the Defendant does not now, as formerly, withdraw the plea: but he must amend it; and may obtain from the Prothonotary, "rules *absolute* to amend pleas, by adding "or substituting a plea of payment, or further payment, "of money into Court, or of set-off, or both; the Defendant undertaking, by such rule, to go to trial at the "following assizes" (j). On serving such rule, the Defendant should also serve an appointment to tax the costs of amendment, which costs ought to be paid before the plea is amended.

The mode of replying to a plea of payment of money into Court, is regulated by rule 19 of Hilary Term, 4 W. IV., which is adopted in this Court in all ordinary cases; and, for the reason before stated, has been expressly extended by rule (3) of Mar. Ass. 6 W. IV. to cases under the statute 4 & 5 W. IV., c. 62, s. 23. These rules provide, that "the Plaintiff, after the [delivery or] filing of a plea "of payment of money into Court, shall be at liberty to "reply to the same, by accepting the sum so paid into "Court, in full satisfaction and discharge of the cause of "action, in respect of which it has been paid in; and he "shall be at liberty, in that case, to tax his costs of suit, "and in case of non-payment thereof, within forty-eight "hours, to sign judgment for his costs of suit, so taxed:

Replication.

(i) Coates & an. v. Stevens, 3 Dowl. P. C. 784.

(j) Reg. Gen. (16) Mar. Ass. 5 W. 4. This rule however, it would seem, applies only, to cases of payment into Court, independently of stat. 4 & 5 W. 4, c. 62, s. 23, which makes a Judge's order necessary, for the purpose.

"or the Plaintiff may reply 'that he has sustained damages [or, 'that the Defendant is indebted to him,' as 'the case may be] (*k*) to a greater amount than the said 'sum : ' and in the event of an issue thereon being found "for the Defendant, the Defendant shall be entitled to "judgment, and his costs of suit."

Further proceedings.

Costs.

If the Plaintiff accept the money in full satisfaction, he must take out an appointment to tax his costs, and serve it in the usual way : and in case of nonpayment of the costs within forty-eight hours after taxation, he may sign judgment, and issue execution. Where the real debt, being less than the sum indorsed on the writ, is paid into Court, and accepted in full, the Plaintiff will only be allowed the costs of the writ, the Defendant applying promptly, for that purpose, and having originally offered to pay the real debt (*l*). But, where the Defendant pays into Court, a less sum than that for which he was arrested, and the Plaintiff accepts it, this is not a case within the statute 43 Geo. III., c. 46, s. 3, so as to entitle the Defendant to costs (*m*). If, however, the Plaintiff proceed after the money is paid into Court, and afterwards stay, and take out the money, the Defendant will be entitled to costs, subsequent to the payment into Court (*n*). And if the Plaintiff proceed to trial, and be nonsuited, or have a verdict against him ; he will be liable to the Defendant's costs, *ab initio* (*n*).

(*k*) The words within brackets are not in the rule of Mar. Ass. 6 W. 4 ; but will be proper, in some cases of payment into Court, independently of the statute 4 & 5 W. 4, c. 62, s. 23.

(*l*) *Hale v. Baker*, 2 Dowl. P. C. 125 : and see *Elliston v. Robinson*, Id 241, 2 Cr. & M. 343, S. C.

(*m*) *Rowe v. Rhodes*, 2 Dowl. P. C. 384, 4 Tyr. 216, S. C. ; see also *Farrant v. Morgan*, 3 Dowl. P. C. 792, as to paying less than 40s. into Court.

(*n*) *Chapman's Pr. K. B.* [2 Ed.] 396.

BOOK 5. CHAP. VI.

OF OYER.

Oyer may be demanded in all cases, where it is allowed by the practice of the Courts at Westminster (a). In what cases allowed.

Such demand must be made before the time for pleading has expired; or, it would seem, before the expiration of the further time, given by a rule for that purpose; and, if made afterwards, the other party may treat the demand as a nullity, and sign judgment (b). At what time to be demanded.

The party demanding Oyer, causes an entry thereof to be made in the Imparlance book, at the Prothonotary's office; and gives notice to the opposite attorney, or agent, that he craves Oyer of the instrument, describing it. The instrument must be left with the Prothonotary, who makes a copy thereof, for the party requiring the same (c). How demanded.

When Oyer is craved by the *Plaintiff*, of a document stated in the Defendant's pleading, such document must be produced within *two* days (exclusive) after notice, otherwise the Plaintiff may sign judgment, as for want of plea (c). When to be delivered by a defendant.

After Oyer is demanded by a *Defendant*, there is no time limited for the Plaintiff to give it: but he should do so without delay, if he wish to expedite the proceedings; for the Defendant has as many pleading days after Oyer delivered, as he had at the time of craving it, and giving notice (d). By a plaintiff

(a) As to Oyer in general see Tidd's Pr. [9th ed.] 586. Arch. [by Chitty] 866-7.

(b) Id. 1 Sell. Pr. 263. Goodricks & an. v. Turley and others 4 Dowl. P. C. 431. And as to demand of pleading, before signing judgment, see ante pa. 175.

(c) Evans' Pr. C. P. L. 58.

(d) See ante pa. 123-4.

BOOK 5. CHAP. VII.

OF NONPROS.

At what time
Nonpros is due
for want of de-
claration.

"The Defendant shall be entitled to judgment of non-pros, at the rule day after the assizes, next ensuing the time of filing bail, or entering a common appearance, unless the Plaintiff shall, in the mean time, file his declaration; or procure and serve a rule, allowing further time to declare until the then next rule day; or obtain further time, upon special application to the Court, or one of the Judges in chambers" (a).

When nonpros
cannot be signed.

Nonpros for want of declaration, cannot, however, be signed after the expiration of a year, from the return (b) of the process; for the Plaintiff is then deemed out of Court (c), and neither party is entitled to costs from the other (d): nor can nonpros be signed, where one only of several Defendants has appeared, in a joint action (e): nor where the Plaintiff has appeared for the Defendant, according to the statute (f): nor after an order for particulars of demand has been served, and before they are delivered (g): nor, in some cases, after a removal from an inferior Court (h).

(a) Reg. Gen. Aug. Ass. 38 Geo. 3, and see ante pa. 116. This rule does not apply to actions of replevin: see ante pa. 217.

(b) It has not yet been decided, whether the return of process for this purpose, is to be considered the time of its execution, or the eighth day afterwards, that being the expiration of the time for appearing and filing bail. In favor of the former position, see Athert. Treat. pa. 19, Chapman's 2nd addenda to the new rules, pa. 115; Cooper v. Nias, 3 B. & Ald 271; Barnes v. Jackson & others, 3 Dowl. P. C. 404: but see *contra*, Arch. (by Chitty), 218, 892.

(c) Reg. Gen. [21] Mar. Ass. 2 W. 4, and see ante pa. 116.

(d) Wynne v. Clarke, 5 Taunt, 649.

(e) Palmer & others v. Feistel & an., 2 Dowl. P. C. 507.

(f) See Arch. [by Chitty] 898.

(g) See ante pa. 252.

(h) See ante pa. 245.

It is not necessary to take out a rule, requiring the Demand of Plaintiff to declare, before nonpros can be signed : but declaration. a demand of declaration must be made, at the time, and in the manner, mentioned in a previous chapter (i).

After nonpros for want of declaration is signed, the Execution. Defendant may immediately issue an execution, for his costs, a taxation of which is, in general, unnecessary, the amount thereof being fixed, in ordinary cases (j). The Defendant cannot levy more than the sum recovered by the judgment, and, therefore, nothing can be taken for Sheriff's poundage, and expenses of the execution (k).

As to the time for signing nonpros for want of replica- Nonpros for want of Replica- tion, or any subsequent pleading, it has already been stated (l), that a Plaintiff is not obliged to reply to, or answer any pleading of a Defendant, until the rule-day next after the filing thereof: nor if such rule-day shall happen within eight days after filing such pleading, until the second rule-day afterwards. If the Plaintiff do not proceed as above, or obtain further time, the Defendant may sign nonpros.

A rule, calling on the Plaintiff to reply, &c., is not ne- Proceedings cessary : but a demand of the pleading must be made, as thereon. before mentioned ; and a bill of costs must be made out, and taxed by appointment, before execution.

Nonpros may be signed, in the case of a rule to dis- Nonpros after continue, *after plea*, and nonpayment of the costs, within rule to discon- four days after taxation, pursuant to the Plaintiff's under- tinue. taking, contained in such rule (m) : and where the De-

(i) See ante pa. 175.

(j) The usual costs are as follows :—After Bail, and including execution, £4. 13s. 2d.—After appearance, and including execution, £2. 10s. 9d. if one Defendant only—with 10s. 8d. more, for each additional Defendant. Where an order for particulars of demand, or a rule for further time to declare, has been obtained, the costs incident to those proceedings must be added : in the former case, a bill of costs must be made out and taxed ; and in the latter, the fee of 4s. 4d., on being served with the rule, will be allowed without a taxation.

(k) *Baker v Sydee*, 7 Taunt. 179. Anon. 2 Chitt. Rep. 353.

(l) See ante pa. 130.

(m) Reg. Gen. [38] Mar. Ass. 2 W. 4, see the next chapter.

fendant was in a condition to sign nonpros, and the Plaintiff took out a rule to discontinue, but instead of paying the costs, served a declaration, the Court of C. P. W. held this to be a fraud on the Court, and refused to set aside the nonpros (n).

In replevin.

The time for signing nonpros in replevin, for want of declaration, is regulated by a rule peculiar to that species of action (o).

(n) *Ariel v. Barrow*, 8 Bing. 375.

(o) See ante pa. 217.

BOOK 5. CHAP. VIII.

OF DISCONTINUING THE ACTION.

Wherever a Plaintiff is allowed by the practice of the Court of Common Pleas at Westminster, to discontinue his action, he may do so, in this Court. In what cases allowed.

A rule *absolute* to discontinue, is granted by the Prothonotary, of course; and if taken out *before plea*, it merely orders that the Plaintiff shall be at liberty to discontinue the action, on payment of costs, to be taxed: but if taken out *after plea*, the rule "shall contain an undertaking, on the part of the Plaintiff, to pay the costs, and a consent, that if they are not paid within four days after taxation, the Defendant shall be at liberty to sign judgment of nonpros (*a*). Rule to discontinue.

On discontinuing, the Plaintiff must file a declaration, if not previously done; but it is usual, in such case, to have one count only.

If the discontinuance be before appearance, the practice is, to affix the rule in the Prothonotary's office; but the better way is to serve it, on the Defendant, together with an appointment to tax his costs; and this should always be done, when the Defendant has incurred any costs which would be allowed as between party and party. Before appearance.

Where the rule is taken out after appearance, or bail, it should be served on the Defendant's attorney, or agent, together with an appointment to tax the Defendant's costs. After appearance.

The costs, when taxed, should be forthwith paid, otherwise the action may be proceeded in (if before plea), as if Taxation and payment of costs.

(a) Reg. Gen. [38] Mar. Ass., 2, W. 4.

no rule had been issued ; for the rule being *conditional* only (that is, on payment of costs), is no stay of proceedings : and the taxation of costs without payment, is no discontinuance (b) ; nor can the Plaintiff be attached for non-payment thereof (c) : but where the discontinuance is after plea, and the costs are not paid within the time mentioned in the rule, the Defendant may sign nonpros, and issue an execution, pursuant to the undertaking contained in such rule.

When the costs are taxed and paid, and the judgment of discontinuance entered, it relates back to the day when the rule to discontinue was obtained ; and the action is considered as discontinued from that time (d).

After discontinuance, the Plaintiff may bring a new action, for the same cause ; but cannot arrest the Defendant a second time, without a Judge's order (e). When such order is obtained, the former affidavit of debt, remaining in this Court, may be used for the purpose of the second arrest (f).

(b) *Edgington v. Proudman*, 1, Dowl. P. C. 152.

(c) *Reese v. Fenn*, 2, Id. 182.

(d) *Brandt v. Peacock*, 1, B. & C. 649.

(e) *Reg. Gen.* [5] *Mar. Ass.* 2, W 4. See ante pa. 65.

(f) *Richards, v. Stuart*, 10 Bing. 322.

BOOK 5. CHAP. IX.

OF TRIAL BY PROVISO.

If the Plaintiff do not try the cause at the first assizes, At what time at which it stands for trial (*a*), the Defendant may, at the ^{a defendant} second, or any subsequent assizes, bring it on to trial, by ^{may try by} proviso.

It is not necessary to procure a rule for a trial by *proviso* ; How to probut the Defendant must give notice of trial, at least *eight* ^{ceed.} days (exclusive) before the assizes (*b*) : and the general rule requiring a four weeks' notice, where a term's notice is necessary in the Court of Common Pleas at Westminster (*c*), does not, it seems, apply to a notice of trial by *proviso* (*d*).

The Defendant must order and prepare the record, issue the jury process (*e*), and enter the cause, at the same time, and in the same manner, as a Plaintiff, in other cases : and if he neither proceed to trial, nor countermand, he will be liable to the Plaintiff's costs of the assizes (*f*).

When the cause is entered by both parties, the practice ^{The trial.} is, to try it on the Plaintiff's entry (*g*) ; provided he has given due notice of trial (*h*) : and if the Defendant enter the cause, and the issue is upon the Plaintiff, who does not appear on the trial, he must be nonsuited, for the Defendant cannot have a verdict (*i*).

(*a*) See ante pa. 132.

(*b*) Reg. Gen. [14] Mar. Ass., 5, W. 4.

(*c*) See ante pa. 144.

(*d*) *Manby v. Wortley*, 2, Blac. Rep. 1223. *Theobald v. Crickmore*, 2, B. & Ald. 594. 1, Chitt. Rep. 317 S. C.

(*e*) See form of Jury process, ante pa. 161.

(*f*) See post pa. 282, & ch. 21, s. 3.

(*g*) *Evans' Pr. C. P. L.* pa. 81.

(*h*) *Brown v. Ottley*, 1, B. & Ald. 253.

(*i*) *Gardener v. Davis*, 1 Wils. 300. 2, Saund. 336, (*b*).

BOOK 5. CHAP. X.

OF THE TRIAL OF ISSUES BEFORE THE SHERIFF, ETC.

Power given
to this Court
to direct is-
sues to be
tried before
the Sheriff,
&c.

It is provided by statute 4 and 5, W. IV., c. 62, s. 20, "that in any action depending in this Court, for any debt or demand, in which the sum sought to be recovered, and indorsed on the writ of *Summons*, shall not exceed twenty pounds, it shall be lawful for the said Court, or any Judge thereof, if such Court, or Judge, shall be satisfied that the trial of the said action will not involve any difficult question either of law or fact, and such Court, or Judge, shall think fit so to do, to order and direct, that the issue or issues joined, shall be tried before the Sheriff of the said County Palatine of Lancaster, or any Judge of any Court of Record, for the recovery of debt in such county; and for that purpose a writ shall issue, directed to such Sheriff, or Judge, commanding him to try such issue or issues, by a jury, to be summoned by him, and to return such writ, with the finding of the jury, thereon indorsed, at a day certain to be named in such writ, and thereupon such Sheriff, or Judge, shall summon a jury, and shall proceed to try such issue or issues."

What cases
are within the
act.

This section is confined to actions for *debts* and *pecuniary demands*, and does not extend to actions of *tort* (a). It was, moreover, intended to apply to *plain* questions only (b); and is expressly limited to actions where the claim does not exceed *twenty pounds*; hence, if the jury give twenty pounds for debt, and ten shillings for interest, the verdict, it seems, will be bad, as to the ten shillings (c): Where the writ of *Summons* is indorsed for a sum exceeding £20., the amount cannot be altered, in order to obtain

(a) *Watson v. Abbott*, 2 Dowl. P. C. 215. 2 Cr. & M. 150, S. C. 4 Tyr. 64, S. C.

(b) Per Parke B., in *Davies v. Lloyd*, 4 Dowl. P. C. 478.

(c) *Burleigh v. Kingdom*, 2 Id., 351.

a writ of Trial (*d*): unless the writ of Summons has been indorsed, by mistake, for more than is due (*c*); and where the indorsement was for £58., the verdict was set aside, though both parties went to trial, without objection (*e*). Neither does the above provision apply to actions commenced otherwise than by writ of *Summons*; and therefore, when commenced by *Capias*, or *Detainer*, or, as we have seen (*f*), removed from an inferior Court, this Court has no power, under the Act, to direct a trial before the Sheriff.

In order to procure a writ of Trial, an affidavit must be made, as below (*g*), upon which, the Prothonotary will grant a rule to shew cause, why the issue joined in the action should not be tried before the Sheriff, or Judge; and why a writ of Trial should not issue for that purpose, pursuant to the statute (*h*). Such rule must be served on the opposite party; and an affidavit of service, laid before the Judge, on applying for an order. The Judge will not grant an order, if he think the trial is likely to involve a difficult question of law, or fact; and if he reject the application, the Court will not afterwards entertain a motion to review his decision—at least not, unless the facts of the case, with what took place before the Judge, are brought specially before the Court (*i*).

Mode of obtaining a trial before the Sheriff &c.

When an order is obtained, it is usual (though not, it would seem, necessary,) to take out a rule thereon; and

(*d*) Trotter v. Bass, 3 Dowl. P. C. 407.

(*e*) Edge v. Shaw and ux. 4 Id. 189.

(*f*) See ante pa. 247.

(*g*) Affidavit to obtain a Writ of Trial.

In the Common Pleas at Lancaster.

Between A B.....Plaintiff,
and

C. D.....Defendant.

E. F., of
Gentleman, attorney for the above-named Plaintiff,
maketh oath and saith, that the sum sought to be recovered, and indorsed on the Writ of *Summons*, in this action, does not exceed *twenty* pounds; that issue has (or "issues have") been joined in the said action, and that the trial will not, as this deponent verily believes, involve any difficult question of law or fact.

E. F.

Sworn, &c., before a Commissioner for taking affidavits in the said Court.

(*h*) Reg. Gen. (21) Mar. Ass. 5 W. 4.

(*i*) Davies v. Lloyd, 4 Dowl. P. C. 478

the rule absolute, or order, must be served, in like manner, as the rule nisi.

Notice of trial.

The order being obtained, notice of trial must be given, which, by a late rule, must be *eight* days (exclusive), and shall specify the time, and place of trial (*j*). Such notice may be countermanded, as in other cases; and if the Plaintiff do not proceed to trial, or countermand, in time, the Defendant will be entitled to costs of the day (*k*).

Judgment as in case of nonsuit, and trial by proviso.

The Court will compel the Plaintiff to proceed to trial, within a reasonable time (*l*); and judgment, as in case of nonsuit, will be granted, at the same time, as in other cases—that is, at the second assizes after issue joined, the Sheriff's court days not being considered as assizes, for this purpose: but where the Plaintiff gives notice of trial, he thereby waives his right to the full time, and in that case, such judgment will be granted at an earlier period (*m*): The Defendant may also bring the cause on to trial by proviso, if the Plaintiff neglect to try (*n*).

Preparing the record.

Previous to the trial, the Plaintiff's attorney should prepare the record: for this purpose, parchment will be furnished by the Prothonotary; and the record must be left with him. The pleadings are copied verbatim, to the end of the issue; after which proceed as below (*o*).

Writ of trial.

The writ of Trial is engrossed on parchment, signed, sealed, and issued, in the same manner as a writ of Inqui-

(*j*) Reg. Gen. (22) Mar. Ass. 5 W. 4.

(*k*) See post pa. 282, & ch. 21, s. 3.

(*l*) Walls v. Redmayne, 2 Dowl. P. C. 508. Horwood v. Roberts, Id. 534. Mullins v. Bishop, Id. 557. Maddeley v. Batty, 3 Id. 205.

(*m*) Bntterworth v. Crabtree, 3 Id. 184. 1 C. M. & R. 519 S.C.; and see Mullins v. Bishop, & Maddeley v. Batty, supra.

(*n*) Corone v. Garment, East T. 1835. 5 Leg. Ex. 303.

(*o*) Award of the Writ of Trial.

"And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said Writ of Summons, does not exceed *twenty* pounds, hereupon, on the day of [the date of the Writ of Trial], pursuant to the statute in that case made and provided, the Sheriff of the said County, [or the Judge to whom the Writ is directed], is commanded, that he summon twelve, &c., who neither, &c., who shall be sworn truly to try the issue above-joined, between the parties aforesaid, and that he proceed to try such issue accordingly, and when the same shall have been tried, that he make known to the Court here, what shall have been done by virtue of the Writ of our Lord the King, to him in that behalf directed, with the finding of the Jury indorsed thereon, on the day of " &c.

ry, in ordinary cases; and should be indorsed with the names of the parties—the nature of the writ—and the time and place of trial. The form of the writ, as prescribed by rule (23) of Mar. assizes, 5 W. IV., is subjoined (p).

When this writ is directed to the Sheriff, the cause is entered at his office, in Preston, on the Monday preceding the holding of the County Court; and at the time of entry, the writ of Trial is left with the undersheriff, together with the rule or order for the writ to issue, and also, the particulars of demand, and set-off, (if any). It is the practice to execute the writ, at the sitting of the County Court, at Preston, or elsewhere. The Court sits at ten o'clock in the forenoon; and the issues from this, and other superior Courts, are tried before the causes depending in the County Court.

Entering the cause for trial before the Sheriff.

Time & place of trial.

(p) *Writ of Trial.*

William the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, to the Sheriff of Lancashire [or to the Judge of being a Court of record for recovery of debt in the said County of Lancaster, as the case may be,] greeting. Whereas *A. B.*, in our Court before our Justices at Lancaster, on the day of last, [the date of the first writ of Summons] impleaded *C. D.* in an action on promises, [or, of debt," &c. as the case may be]; for that whereas one, &c. [here recite the declaration as in a writ of Inquiry], and thereupon he brought suit; and whereas the Defendant on the day of last, by his attorney, [or as the case may be], came and said [here recite the pleas and pleadings to the joinder of issue], and the Plaintiff did the like; and whereas the sum sought to be recovered in the said action, and indorsed on the Writ of Summons, does not exceed twenty pounds; and it is fitting that the issue above joined should be tried before you, the said Sheriff, [or Judge, as the case may be] We, therefore, pursuant to the statute in such case made and provided, command you, that you do summon twelve free and lawful men of your County, [or of the County of Lancaster], duly qualified according to law, who are in no wise akin to the Plaintiff, or to the Defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try the said issue accordingly; and when the same shall have been tried in manner aforesaid, We command you that you make known to our said Justices, what shall have been done, by virtue of this Writ, with the finding of the Jury indorsed thereon, on the day of instant, [or next]. Witness [the Chief Justice] at Lancaster, the day of [day of issuing] in the year of our Reign.

E. F., Attorney for the Plaintiff.
G. H., Attorney for the Defendant.

Indorsement.

By order of [Judge's name] dated the day of 18
To be tried at in in the County of on the
day of 18 .

Entry for
trial before
a judge.

When the writ is directed to the Judge of any Court of record, it should be left with the officer of such Court, a reasonable time before the trial; and the time and place of executing it, ought to be previously fixed with such officer, in order that the notice of trial may specify the same.

The trial and
its incidents.

The proceedings on the trial, are the same as on a trial at the assizes; the attendance of witnesses, is compellable by *Subpœna* (q), in like manner: and the Plaintiff may be nonsuited, as upon a trial before a Judge, at *nisi prius* (r). It is questionable whether the Sheriff has power to postpone the trial (s): but he cannot certify, to deprive a Plaintiff of costs, pursuant to 43 Eliz. c. 6, s. 2(t), (which act is extended to Counties Palatine, by 11 and 12 W. 3, c. 9).

Amendments
on the trial.

With respect to amendments on the trial, it is provided by the 21st sec. of 4 and 5 W. IV., c. 62, that "the Sheriff or his deputy, or Judge, presiding at the trial of such issue, or issues, shall have the like powers, with respect to the amendment on such trial, as are given to Judges at *nisi prius*, by 3 and 4 W. IV., c. 42" (u): and, by the same section, it is declared, that "the verdict of the

(q) *Subpœna on a Trial before the Sheriff, &c.*

William the Fourth, &c., to greeting: We command you, and every of you, that laying aside all and singular business and excuses whatsoever, you, and every of you, be, and appear, in your proper persons, before Esquire, Sheriff of the County of Lancaster, at the Court House in Preston, in the County aforesaid, [or as in the notice of trial], on the day of next, at the hour of ten o'clock in the forenoon, of the same day, then and there to testify the truth, according to your knowledge, in a certain cause, in our Court before our Justices at Lancaster, depending, undetermined, between A. B. Plaintiff, and C. D. Defendant, in an action on promises, [or, as the case may be], on the part of the Plaintiff [or, "Defendant"] and on that day to be tried by a jury of the country: and this you, or any of you, shall in no wise omit, under the penalty of one hundred pounds. Witness [the Chief Justice of this Court] at Lancaster, the day of [the day of issuing] in the year of our reign.

E. F., Attorney. Clarendon.

(r) Per Bayley J., in *Watson v. Abbott*, Supra note (a)

(s) *Edwards v. Dignam*, 2, Dowl. P. C. 642. *Packham v. Newman*, 3 Id. 165.

(t) *Wardroper v. Richardson*, 1, Ad. & El. 75.

(u) As to amendments under this Act—see Arch. [by Chitty] 334.

"jury on the trial of such issue, or issues, shall be as
 "valid, and of the like force, as a verdict of a jury at
 "the assizes."

Verdict.

It is also provided by such section, that at the return of the writ of trial, costs shall be taxed, judgment signed, and execution issued, *forthwith*, unless the Sheriff, deputy, or Judge, before whom such trial shall be had, shall certify, under his hand, upon such writ, that judgment ought not to be signed, until the Defendant shall have had an opportunity to apply to *this Court*, or one of the Judges thereof, for a new trial; or the said Court, or one of the Judges thereof, shall think fit to order, that judgment or execution shall be stayed, till a day to be named in such order. The Sheriff's return may be had, on application of the party obtaining the verdict, who (if there is no certificate to prevent him,) may tax the costs, without serving an appointment, and issue execution immediately, provided the cause were undefended; but, if defended, an appointment must be served in the usual way, and the bill of costs, affidavit of increase &c., left with the Prothonotary.

Taxing costs.
and issuing
execution.

The costs are taxed according to the reduced scale of costs, in similar cases, in the Courts at Westminster (v): and it may be proper to observe, that no allowance will, in general, be made, for brief, beyond 13s. 4d., which sum includes instructions for it: nor will Counsel's fee be allowed, except the trial be in a Court where attorneys are not permitted to practise, and then, £1. 1s. only, will be allowed (w). The fees payable to the officer of the inferior Court, are not to exceed 4s. on the entry of the cause, and £1. 4s. 6d. on the trial.

Allowance of
costs.

"Notwithstanding any judgment signed, or execution issued, as aforesaid, by virtue of the act, it shall be lawful for *this Court*, to order such judgment to be vacated, and execution to be stayed, or set aside, and to enter an arrest of judgment, or grant a new trial, as justice may appear to require: and thereupon the party affected by

Setting aside
judgment &c.

(v) Reg. Gen. (26) as of Mar. Ass. 5 W. 4: & see post B. 5, ch. 22, s. 2.
 (w) Chap. Pr. K. B. [3rd Addend.] pa. 133.

"such writ of execution, shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment, by writ of Error, or otherwise, as the Court may think fit to direct" (x).

Motion for
new trial.

The rule forbidding a motion for a new trial, where the amount is under £20. except for misdirection of the Judge, does not apply to trials before the Sheriff (y) : but the permission of the Judge before whom the cause is tried, must, it seems, be obtained, before an application is made to set aside the verdict, and enter a nonsuit (z).

Where to be
made.

The motion for a new trial, under the 21st sec. of the stat. 4 and 5 W. IV., c. 62, may be made to *this Court*, or *one of the Judges* thereof; but the power of granting a new trial, &c., under the 22nd section, is given to *this Court*, only; and the 26th section, which provides that motions for new trials, may be made, to any of the Courts at Westminster, seems to be confined to such motions, after trials at an assizes (a).

When to be
made.

It has not been determined, within what period the application to the Court or a *Judge*, for a new trial, should be made, when the Sheriff has certified, under the 21st section of the act; but such application ought to be made without delay. And as the application under the 22nd section must be made to the *Court*, it had better be made, as soon as a motion for that purpose can be heard (b).

Sheriff's
notes.

On moving for a new trial, either the Sheriff's notes, or an affidavit of facts, must be produced (c). The notes must be verified, by affidavit: and if not produced, their non-production should be accounted for (d). If the Sheriff

(x) 4 & 5, W. 4, c. 62. s. 22.

(y) *Edwards v. Dignam*, 2 Dowl. P. C. 642,

(z) *Ricketts v. Bird*, K. B. P. C. Hil. T. 1836. See Leg. Obs. Sess. 1835-6, pa. 259.

(a) See post pa. 285.

(b) *Wheeler v. Whitmore*, 4 Dowl. P. C. 235. See post ch. 21, s. 3.

(c) *Johnson v. Wells*, 2 Dowl. P. C. 352. *Grainge v. Shoppee*, Id. 644. *Thomas v. Edwards*, Id. 664. *Barnett v. Glossop*, 3 Id. 625. *Muppin v. Gillatt*, 4 Id. 190.

(d) *Mansfield v. Brearey*, 1 Ad. & E. 347. *Burney v. Mawson*, Id. 348, note (a).

refuse to transmit his notes, the Court will order him to pay the costs consequent on such refusal (e) ; and will allow further time to make the motion (f).

The notes are transmitted to the Judge, and neither party it seems, is entitled to them, for the purpose of the motion (g). The *pleadings* need not be verified, if the objection be founded upon them (h).

(e) *Metcalf v. Parry*, 2 Dowl. P. C. 589. *Same v. Same*, 3 Id. 93.

(f) *Thomas v. Edwards*, 2 Id. 664.

(g) *Vickers v. Cock*, 3 Dowl. P. C. 492.

(h) *Milligan v. Thomas*, 4 Dowl. P. C. 373.

BOOK 5. CHAP. XI.

OF JUDGMENT AS IN CASE OF NONSUIT.

Judgment as in case of nonsuit. ● Judgment, as in case of nonsuit, may be obtained in this Court, as well as in the Courts at Westminster, by virtue of the statute 14 Geo. II. c. 17. (a).

At what time allowed. According to this Act, the proper time to apply for such judgment is, when the Plaintiff "shall neglect to bring the issue on to be tried, according to the course and practice of the Court." The practice of this Court is, to grant the application, at the *second* Assizes after issue joined, provided it is joined in time for trial at the first Assizes (b); and lapse of time is no bar to the application (c): but "no motion for judgment as in case of nonsuit, shall be allowed, after a motion for costs for not proceeding to trial, for the same default; but such costs may be moved for separately" (d).

Motion for. The statute requires the application to be by "*motion* made in open Court, (due notice having been given thereof)": but, in practice, the rule *nisi* has been deemed sufficient notice of the motion (b): and it has lately been provided (e); "that a rule *nisi* for judgment as in case of nonsuit, may be obtained, on motion, without previous notice; but in that case it shall not operate as a stay of proceedings."

(a) In what cases such judgment is allowed; see Tidd's Pr. [9th Ed]. 762; Arch. [by Chitty], 910. And as to such Judgment where a trial is directed before the Sheriff, see ante pa. 272.

(b) Evans' Pr. C. P. L. 86. And see ante pa. 132.

(c) Cromer v. Brown, 4 Dowl. P. C. 288.

(d) Reg. Gen. (30) Mar. Ass. 2 W. 4, and see post. pa. 283.

(e) Reg. Gen. (29) Mar. Ass. 2 W. 4.

The motion must be made upon affidavit (*f*), that issue has been joined, and stating when, in order to shew the Plaintiff's default. It is not sufficient to make oath, that the Plaintiff has *replied*, and that the cause is *thereby* at issue; but it must be positively stated in the affidavit, that the cause is at issue (*g*); and though the Defendant swear that it is so, yet if the Plaintiff make oath that a similiter has not been added, the Court will not grant a rule absolute (*h*).

On a rule *nisi* being allowed, the Prothonotary makes out such rule, which must be served on the opposite party; and if no cause be shewn, the Court, on motion, founded on an affidavit of service of the rule, will make it absolute. The rule absolute is also made out by the Prothonotary, and, together with an appointment to tax, is served in the usual manner: and the Defendant may issue an execution as upon a nonsuit on a trial.

But, instead of making the rule absolute, the Judge may, pursuant to the statute 14 Geo. II. c. 17, allow further time for trial, "*upon just cause, and reasonable terms.*" The terms usually imposed, are, that the Plaintiff give a peremptory undertaking to try the cause, at the following assizes. It was *formerly* considered that the first motion for judgment, was merely a means of obtaining such undertaking; the giving of which was, of itself, deemed

(*f*) *Affidavit to move for judgment as in case of nonsuit.*
In the Common Pleas at Lancaster.

Between A. B. Plaintiff,
and

C. D. Defendant.

E. F. of Gentleman, maketh oath and saith, that he has inspected the Imparance book, kept at the office of the Prothonotary of this honorable Court, from which it appears that issue was joined in this Cause, on the day of 1835, and that this cause stood for trial, according to the course and practice of this Court, at the assizes last; and this deponent further saith, that the said Plaintiff has not yet proceeded to the trial of this cause, nor has he given any notice of trial for the present assizes; [or "that he has given countermand notice of trial," or "neglected to enter the cause for trial, at the present assizes," as the case may be].

Sworn, &c. E. F.
Before a Commissioner for taking Affidavits in the said Court.

(*g*) *Smith v Parslow*, 2 Tyr. 284. 2 C. & J. 217, S. C. 1 Dowl. P. C. 308, S. C.

(*h*) *Gilmore v. Melton*, 2 Dowl. P. C. 632, *Brown v. Kennedy*, Id. 639. *Seabrook v. Cave*, Id. 691.

a sufficient answer to the application (i) : but *now*, besides this undertaking, the Plaintiff must shew *some* excuse for not proceeding to trial (j); and an affidavit is generally required, of the facts constituting such excuse. A slight excuse, however, when accompanied with a peremptory undertaking, is deemed sufficient (k). When the excuse is sufficient without such undertaking (k), the rule will be discharged : but the Defendant may still terminate the suit, by bringing it to trial by proviso.

On the rule for judgment being *discharged*, the Court "may order the Plaintiff to pay the costs of not proceeding to trial ; but the payment of such costs, shall not be made a condition, of discharging the rule (l)."

When the motion is discharged on a peremptory undertaking to try, as before mentioned, a rule discharging the rule *nisi* on the terms of such undertaking, is made out by the Prothonotary, and a copy of it must be served on the opposite party.

Rule absolute after a peremptory undertaking.

Notwithstanding the peremptory undertaking to try, the Plaintiff must give notice of trial, for the following assizes (m) ; and if he do not try accordingly, the Court, on motion, founded on an affidavit (n) of such default, and of the undertaking, will grant a rule *absolute* for

(i) 1 Sell. 367.

(j) Nicholl v. Collingwood, 2 Dowl. P. C. 60. Banks v. Wright, 3 Id. 14. Cleasby v. Poole & ors., Id. 162.

(k) As to what is a sufficient excuse ; see Chitt. Gen. Prac. vol. 3, part 6, pa. 791 ; and what not Id. pa. 792 : see also Tidd's Pr. [9th Ed.] 766. Arch. [by Chitty] 914. 1 Sell. 367.

(l) Reg. Gen. (30) Mar. Ass. 2 W. 4.

(m) Sulsh v. Cranbrook, 1 Dowl. P. C. 148. Bainbridge v. Purvis, Id. 444-5.

(n) *Affidavit to move for a rule absolute, for judgment as in case of nonsuit, after a peremptory undertaking.*

In the Common Pleas at Lancaster.

Between A. B. Plaintiff,
and

C. D. Defendant.

E. F., of maketh oath and saith, that the above-named Defendant at the last [March] assizes, holden for the County of Lancaster, obtained a rule nisi of this honorable Court, in this cause, for judgment as in case of a nonsuit, which was afterwards discharged, by another rule of this honorable Court, (a copy of which is hereunto annexed).

judgment, in the first instance ; of which motion, no notice is necessary (*o*). But if it appear, that notice of trial was omitted, by mistake, and the Defendant has not been put to inconvenience thereby, the Court will discharge the rule for judgment, on payment of costs ; and the time for trial, after a peremptory undertaking, will be enlarged, if the Court think it reasonable to do so (*p*)

ed,) upon a peremptory undertaking of the above-named Plaintiff, to try this cause at the present assizes ; and this deponent further saith, that the said Plaintiff hath not since proceeded to the trial of this cause, in pursuance of the said undertaking.

Sworn, &c.

E. F.

Before a Commissioner for taking Affidavits in the said Court.

(*o*) Evans' Pr. C. P. L. 87, and see Saxon v. Swabey, 4 Dowl. P. C. 105.

(*p*) Charrington v. Meatheringham, & an. 4 Dowl. P. C. 479 : and see Haines v. Taylor, 2 Dowl. P. C. 644.

BOOK 5. CHAP. XII.

OF COSTS OF THE ASSIZES.

When allowed.

Where the Plaintiff neither proceeds to trial, at the first assizes at which the cause stands for trial (*a*), nor gives sufficient notice of countermand (to be presently mentioned), or, if, after giving notice of trial for any subsequent assizes, he do not proceed, nor countermand such notice in time, the Defendant will be entitled to costs of the day,—or, as they are called in this Court, costs of the assizes: and a *Plaintiff* is entitled to such costs, where the Defendant, after giving notice of trial by *proviso*, neither proceeds to trial, nor countermands such notice, in time. Where both parties give notice, and neither of them proceeds to trial, nor countermands, each is entitled to costs, from the other (*b*): and, “where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon, by a rule to *shew cause* why he should not pay costs, though he has not been dispaupered” (*c*).

Although costs of the assizes are not generally allowed, unless the cause is at issue, yet where a Defendant is under terms to go to trial at the following assizes, (in which case, the Plaintiff may make up the issue, just on the eve of trial,) it will be proper for the Plaintiff, if he do not intend to try, to give notice to that effect, in order to prevent the Defendant from incurring costs.

Notice of countermand, when to be given.

No time is prescribed, for giving countermand notice of trial, so as to avoid liability to the costs of the assizes; but such notice must be *reasonable*; and whether so or not is determined by the Prothonotary, according to the

(*a*) See *ante* pa. 132.

(*b*) 1 Sell. Pr. 413.

(*c*) Reg. Gen. (40) Mar. Ass. 2 W. 4. See also *Doe dem Lindsey v. Edwards* 2 Dowl. P. C. 468, and *Doe v. Edwards* Id. 572.

circumstances of the case. In general, however, such costs will not be allowed, if incurred more than *fourteen* days before the assizes: but there may be cases, where costs of preparing for trial would be allowed, though incurred prior to that period; as, for instance, where, to secure the attendance of witnesses who are about to leave the country, it is necessary to serve subpoenas.

The ordinary costs of the assizes, consist of the costs of summoning witnesses,—of their and the attorney's attendance - and of refresher and consultation fees, paid to counsel. The costs of preparing briefs, are costs in the cause; and if no other expenses have been incurred than in the issuing and service of Subpoenas, the practice is, to call upon the opposite party to pay them; and if he refuse, then to move the Court. What costs of the assizes consist of.

The application for costs of the assizes, must be, by *motion*, which ought not to be made after a rule absolute for judgment as in case of nonsuit, *for the same default (d)*: but may be made "without moving at all for judgment as in case of nonsuit, or after such motion is disposed of; or, the Court, on discharging a rule for judgment as in case of nonsuit, may order the Plaintiff to pay the costs of not proceeding to trial; but the payment of such costs, shall not be made a condition of discharging the rule." (e) And when the rule for judgment is *discharged*, it is not necessary to make a separate motion for costs of the assizes; for though the Court will not grant them, as a condition of discharging the rule, yet they will grant them, as a separate part of the order (f). When to be applied for.

The motion for costs, is one, of course (g), and a rule will be granted, in the first instance, without an affidavit, where the cause has been entered for trial, and struck out of the list, or the record withdrawn; but where Motion for costs.

(d) *Clarke v. Simpson* 4 Taunt. 591

(e) Reg. Gen. [30] Mar. Ass. 2 W. 4.

(f) *Piercy & an. v. Owen* 1 Dowl. P. C. 362, *Lenniker v. Barr* Id. 563
2 C. & J. 473 S. C.

(g) See post pa. ch. 21, s. 3.

the cause is not entered, then if the application be made at the first assizes after issue joined, it should be supported by an affidavit of the cause being at issue, in time; or, if made at a subsequent assizes, of notice of trial having been given: and the affidavit must also shew, either that there has been no notice of countermand, or an insufficient one, stating the time of receiving it (h).

Rule for costs The rule for costs directs "that the attorneys or agents of both parties, shall attend the Prothonotary, or his deputy, who shall examine the matter, and tax the [Defendant] his costs, for that the [Plaintiff] hath not proceeded to trial, pursuant to the practice of the Court; which costs, when taxed, shall be paid by the [Plaintiff], if it shall appear to the said Prothonotary, or his deputy, that costs ought to be paid." Although such rule is absolute, in the first instance, yet, in effect, it is but a rule nisi, the payment of costs depending upon the ultimate decision of the Prothonotary, who may require from the parties, affidavits in support of, or in opposition to, the allowance of costs, if he think it necessary.

Taxation. A copy of the rule, and of the Prothonotary's appointment to tax, must be served on the opposite attorney, or agent; and where the Prothonotary determines that costs ought to be paid, he grants his allocatur of the amount,

Payment of costs, how enforced. Payment of the costs may be enforced by attachment; and the party liable to them, must be personally served with a copy of the rule and allocatur, and at the same time, the rule must be shewn, and the costs demanded. As the rule does not state whether the costs are to be paid to the party, or his attorney, it is considered, in practice, that either may demand them: but, in applying for an attachment for non payment, both should join in the affidavit, one making oath to a demand and refusal; and both negating the receipt of the money. The mode of obtaining an attachment, is stated in another place (i).

(h) See Evans' Pr. C. P. L. 76: & see form of Affidavit Tidd's Pr. forms [6th Ed.] pa. 312. Chitty's forms pa. 700.

(i) See post ch. 22, s. 4.

BOOK 5. CHAP. XIII.

OF NEW TRIALS (a).

Formerly, the only mode of obtaining a new trial, was Motion for by motion *to this Court*; and if there was not sufficient new trial. time to answer the application at the assizes at which it To this Court. was made, the rule *nisi* for a new trial, was made returnable before both the assize Judges, in London.

But the confining of applications for new trials to this To one of the Court, being found inconvenient and unsatisfactory, it is Courts at provided by statute 4 and 5 W. IV. c. 62, s. 26, that "it Westminster, shall be lawful for any party, in any action, depending or pursuant to "hereafter to be depending, in the Court of Common Pleas stat. 4 and 5 W. 4 c. 62, s. 26, "at Lancaster, to apply, by motion, to any one of the "superior Courts at Westminster, sitting in *Banco*, within "such period of time, after the trial, as motions of the "like kind, shall, from time to time be permitted, to be "made in the said superior Court, for a rule to show "cause why a new trial should not be granted, or nonsuit "set aside, and a new trial had, or a verdict entered for "the Plaintiff, or Defendant, or a nonsuit entered, as the "case may be, in such action; which Court is hereby "authorized and empowered to grant, or refuse, such rule, "and afterwards to proceed to hear and determine the "merits thereof, and to make such orders thereupon, as "the same Court shall think proper. And in case such "Court shall order a new trial to be had in any such "action, the party or parties obtaining such order, shall "deliver the same, or an office copy thereof, to the Protho- "notary of the said Court of Common Pleas at Lancaster, "or his deputy; and thereupon all proceedings upon the "former verdict, or nonsuit, shall cease: and the action

(a) As to the grounds on which a new trial will be granted, see Tidd's Pr. [9th Ed.] pa. 904, Arch. [by Chitty] 922: and as to applications for new trials before the Sheriff, see ante pa. 275-6.

"shall proceed to trial, at the next or some other subsequent session of assizes, holden for the County of Lancaster, in like manner as if no trial had been had therein: or in case the Court before which any such rule shall be heard, shall order the same to be discharged, the party or parties obtaining any such order, may, upon delivering the same, or an office copy thereof, to the said Prothonotary, or his deputy, be at liberty to proceed in any such action, as if no such rule nisi had been obtained; or if a verdict be ordered to be entered for the Plaintiff, or Defendant, or a nonsuit be ordered to be entered, as the case may be, judgment shall be entered accordingly."

The 28th section of this act provides, that "nothing therein contained, shall prevent the said Court of Common Pleas at Lancaster, from granting any new trial, or setting aside any nonsuit, or entering a nonsuit, or altering a verdict, as heretofore."

Cases to which the statute does not extend.

This statute does not empower the Court above, to order a judgment to be entered, *non obstante veredicto* (b); or to set aside a verdict entered pursuant to an award, and to enter a nonsuit (c).

To what Court the motion should be made, and when.

Although the act provides that the motion may be made to "any one of the superior Courts at Westminster," yet it has been resolved, that it shall be made to the Court of which the Judge who presided at the trial is a member (d): and it must, according to the act, be made "within such period of time, after the trial, as motions of the like kind shall from time to time, be permitted to be made, in the said superior Court," that is, (according to the present practice), within the first four days of the following term (e).

Judgment and execution not to be stayed without a recognizance being entered into.

In order to prevent judgment being signed, and execution issued, before the motion can be heard, the party intending to apply, must enter into the recognizance

(b) *Potter v. Moss* 3 Dow. P. C. 432.

(c) *Terns v. Fitzhugh*, Id. 278. 1 Cr. M. & R. 597, nom. *Byrne v. Fitzhugh*.

(d) *Foster v. Jolly*, 1 Cr. M. & R. 704. 5 Tyr. 239, S. C.

(e) *Tidd's Pr.* [9th Ed.] 912. *Arch.* [by Chitty] 931. 1 Sell. Pr. 484; 1 Chitt. Rep. 392, 6 Bing. 622. *Howell v. Howell*, 6 B. & Cr. 427.

mentioned in the 27th section of the act, which provides "that the entering up of judgment in any action in this Court, and the issuing of execution upon such judgment, shall not be stayed, unless the party intending to apply for such rule, [for a new trial] shall, with two sufficient sureties, such as this Court shall approve of, become bound unto the party for whom such verdict or nonsuit shall have been given, or obtained, by recognizance, to be acknowledged in the same Court, in such reasonable sum, as the same Court shall think fit, to make and prosecute such application, as aforesaid, and also to satisfy and pay, if such application shall be refused, the debt, or damages, and costs, adjudged, and to be adjudged, in consequence of the said verdict, or nonsuit, and all costs and damages to be awarded for the delaying of execution thereon." (f). The nature of such recognizance is similar to that required on a writ of Error (g).

In allowing a new trial, the Court either directs the costs of the former trial to abide the event, or grants the rule without, or upon payment of, such costs, or is silent as to them: and "if a new trial be granted, without any mention of costs in the rule, the costs of the first trial, shall not be allowed to the successful party, though he succeed on the second." (h)

(f) As to the effect of a similar clause for the Court of great Sessions in Wales, see *Howell v. Howell*, 6 B. & Cr. 427.

(g) See the form of a recognizance in Error, Tidd's pr. forms [6th Ed.] 581. and see post pa., 300.

(h) Reg. Gen. [28] Mar. Ass. 2 W. 4.

BOOK 5. CHAP XIV.

OF SURRENDERING A DEFENDANT IN DISCHARGE OF BAIL

At what time
a defendant
may be sur-
rendered.

A Defendant may surrender himself in discharge of his bail to the Sheriff, within eight days after the execution of the writ of *Capias*, the Sheriff consenting to accept such render (a). After that time, the Defendant cannot be surrendered, without *special bail* being filed : but when special bail is filed, he may surrender himself voluntarily, or be compulsorily rendered by his bail, in any stage of the suit; and it has been shewn elsewhere, at what time the render ought to be made, after proceedings are taken against the Sheriff (b), on the bail bond (c), or on the recognizance of bail (d).

What bail suf-
ficient for the
purpose of
render.

When bail is filed for the sole purpose of a surrender, the bail-piece is sufficient without the usual affidavit of justification being annexed ; but the Plaintiff may treat such bail as a nullity, until the surrender is actually made, and due notice thereof given (e). Bail, too, though rejected, are allowed to render the principal, without entering into a fresh recognizance (f).

Rule to sur-
render, and
proceedings
thereon.

After special bail is filed, the Prothonotary will grant a rule *absolute*, in the first instance, to surrender the Defendant (g)—see the form of the rule below (h). Upon

(a) *Turner v. Brown*, 2 Dowl. P. C. 547 ; and see ante pa. 102.

(b) Ante pa. 103.

(c) Ante pa. 110.

(d) Ante pa. 222-3.

(e) Reg. Gen. Mar. Ass. 57 Geo. III. See ante pa. 92.

(f) Reg. Gen. (11) Mar. Ass. 3 W. IV.

(g) Reg. Gen. Mar. Ass. 52 Geo. III.

(h) Rule to Surrender.

Clarendon. Assizes. W. 4.

C. D } The day of 1836. Upon application of the Defendant's
ate } bail to surrender their principal, It is ordered by the Court, that
A. B. } the said Defendant be forthwith committed to the custody of the
keeper of the gaol of this county, as to this action, and that his bail from
their recognizance be wholly discharged. By the Court.

this rule, the bail may take their principal, (if at large,) even though out of the county, and there is no time limited within which the rule is operative: Although the bail cannot render their principal on a Sunday, still they may take him (i). The rule is delivered to the gaoler, with the person of the Defendant, and a copy thereof, together with notice of actual render, should be served upon the Plaintiff's attorney or agent, without delay, which being done, the surrender is complete, and it is not necessary, in such case, to enter an *exoneretur* on the bail-piece (j). Where the Defendant is already a prisoner, in the gaol of this Court, all that is necessary to be done, is, to lodge the rule with the gaoler, and to serve a copy of it, together with notice of render, as before mentioned.

The proceeding just pointed out, can, of course, only be adopted, when the Defendant is at large, or in the gaol of this Court. Where he is a prisoner elsewhere, of one of the Courts at *Westminster*, the mode of effecting a surrender, in discharge of his bail in this Court, is, in the first place, by removing the cause to the Court of which he is a prisoner. For this purpose, the bail must apply to such Court, or a judge thereof, upon affidavit, (k) for a rule, or summons, to shew cause why a writ of *Certiorari* should not issue, to remove a transcript of the record to the Court above, to enable the bail to render the principal there. The affidavit whereon such application is grounded, must be sworn before a commissioner for taking affidavits in

(i) *Per Bayley J. in Howard v. Smith* 1 B. & Ald. 529.

(j) *Evans' Pr. C. P. L.* 43.

(k) *Affidavit to obtain a Certiorari for the purpose of render.*

In the [King's Bench].

J. N. of &c., and R. N. of &c., make oath and say, that on or about the day of an action was commenced in His Majesty's Court of Common Pleas at Lancaster, wherein A. B. was Plaintiff and C. D. Defendant, in which said action the said Defendant was arrested for the sum of ; And these deponents became special bail for the said Defendant; And these deponents are informed and believe, that the said action is still depending, and that the said Defendant is now a prisoner, confined for debt in the custody of [as the case may be]; And these deponents further say, that they are desirous of suing forth a Writ of *Certiorari*, to remove the said cause, from the said Court of Common Pleas at Lancaster, into this honorable Court, in order that they may be enabled to surrender the said Defendant, in discharge of his bail, in the said action,

Sworn, &c. [see the text].

J. N.
R. N.

the Court to which the application is made; but should not be intituled with the names of the parties (*l*). The writ of *Certiorari* issues from the Court of which the Defendant is a prisoner; and the proceedings upon it are stated in another place (*m*). The Court above having thus obtained cognizance of the cause, may accept of the Defendant's surrender. Notice of render must be given as in other cases, and an order is obtained from a judge to enter an *exoneretur*, on the bail piece remaining in this Court, which is entered accordingly, and the bail are discharged (*l*).

Surrender
when the de-
fendant is in
Custody of
an inferior
Court.

When the Defendant is a prisoner of any inferior Court within the county, he may be brought up to be surrendered in discharge of his bail in this Court, by writ of *Habeas corpus cum causa*; and this, whether he be a prisoner for debt, or on a criminal charge. It is doubtful, however, whether the writ, in the latter case, can be issued from the civil side of the Court, though this has been allowed (*n*).

The writ of *Habeas Corpus* (*o*) is made out by the party—signed by the Prothonotary,—sealed, on a docket obtained from the Cursitor,—tested, and dated, as other writs issuing from this Court—and may be made returnable immediately. When issued, it is left with the judge, for his allowance; and when allowed, it is lodged with the keeper of the gaol, to whom it is directed, who attends with the Defendant, before a judge, either in Court, or at chambers. There is no modern instance of a writ of *Habeas Corpus*

(*l*) Evans' Pr. 143-4.

(*m*) See ante pa. 249.

(*n*) Mortimer v. Pitt, Lan. Aug. Ass. 54 Geo. 3, Bayley, J.; but see Hodgson v. Temple, 5 Taunt. 503.

(*o*) Writ of *Habeas Corpus cum causa*.

William the Fourth, &c. to the Mayor and Bailiffs of our Borough and Town of [Liverpool], in the County of Lancaster, greeting. We command you, that you have before our Justices at Lancaster, immediately after the receipt of this Writ, the body of C. D. late of in our prison, under your custody, detained, as is said, by whatsoever name he is called in the same, together with the day and cause of the taking of the same C. D., to do and receive what our said Justices shall consider of him in that behalf; and have you there this Writ. Witness, &c. [as in a Writ of *Summons*].

At the suit of A. B.

E F., Attorney. Clarendon.

being issued except during an assizes, in which case the Defendant has been brought up, before a judge at the assize town; but by an old rule of this Court (*p*), it is ordered, "that if any one be taken, or attached, in corporation, or liberty, within the county, by process of such corporation or liberty, such person may have his *Habeas Corpus cum causa*, returnable immediately, or at a day certain, before the justices of this Court, at the Prothonotary's office, in Preston, upon the return whereof, the Prothonotary, or deputy, in the justices' absence, shall take bail, and thereupon make a *supersedeas* for Defendant's enlargement, if he be in custody."

When the Defendant is thus removed, a rule to surrender must be lodged with the gaoler, and notice of render given, as before-mentioned.

But instead of granting a writ of *Habeas Corpus*, (which is not always available), the Court will sometimes extend the time for surrendering a Defendant, in discharge of his bail (*q*); as, for instance, until the expiration of a certain time after the action in the Court below (of which the Defendant is a prisoner) is settled (*r*).

(*p*) Sep. Ass. 1655.

(*q*) *Hodgson v Temple*, 5 Taunt. 503. *Campbell v, Acland*, 3 Tyr. 230.

(*r*) *Id.* and see *Richmond v. Hoey*, rule to extend the time, granted by Hullock, B, Aug, Ass, 1828.

BOOK 5. CHAP. XV.

OF STATING A SPECIAL CASE WITHOUT PROCEEDING
TO TRIAL.

Power given
to state a spe-
cial case
without pro-
ceeding to
trial.

The power given, by the Law Amendment Act (*a*), of stating a special case for the opinion of the Courts at Westminster, without the necessity of proceeding to trial, has been extended to suitors in this Court, by statute 4 & 5 W. IV. c. 62, s. 16, which enacts, that "it shall be lawful for the parties in any action, depending, or to be depending, in the said Court of Common Pleas at Lancaster, after issue joined, by consent, and by order of one of the judges of the same Court, to state the facts of the case, in the form of a special case, for the opinion of the said Court, or of one of the superior Courts of common law at Westminster; and to agree that a judgment shall be entered for the Plaintiff, or Defendant, by confession, or of *nolle prosequi*, immediately after the decision of the case, or otherwise, as the Court, before which such case shall be heard, may think fit; and judgment shall be entered accordingly."

Proceedings
thereon.

No general rule has yet been made, in furtherance of the above enactment; and therefore, when the decision of one of the Courts at Westminster is sought for, the practice as to the drawing, settling, and signing of the special case, as well as the proceedings thereon to argument, must be regulated by the rules of such Court (*b*). And when the opinion of this Court is to be had, it is conceived, that, after the case is drawn, settled, and signed by counsel on both sides, it must be entered with the Marshal at the assizes, in the same manner as issues in fact—that copies of the case must be delivered to the judges, and counsel—and that the subsequent proceedings will be the same, as on a demurrer. (*c*).

(*a*) 3 & 4 W. IV. c. 42, s. 25.

(*b*) See Tidd's Pr. (9th ed.) 898-9. Arch. (by Chitty) 540; and see Prac. Rules (6 & 7) of the Courts at West. of Hil. T., 4 W. IV., as to the proceeding to argument, and preparing and delivering copies of the special case.

(*c*) See ante pa. 137.

BOOK 5. CHAP. XVI.

OF ARBITRATION.

There is but little that is peculiar in the practice of this Court, on the subject of Arbitration (a).

When an agreement, or a bond, of reference, has been entered into, containing a provision, that the same may be made a rule of any of his Majesty's Courts of record, in general, or of this Court in particular, (whether an action be depending, or not,) a Judge's order is obtained, upon an affidavit, verifying the signatures to such submission. This order, with the submission, and affidavit, must be left with the Prothonotary, who makes out a rule of reference, reciting the submission; and if an umpire has been appointed, or the time for making the award enlarged, in writing, the signing thereof ought also to be verified, by affidavit, in order that the statement of these facts, may be embodied in the rule.

Mode of obtaining a rule of reference.

Where there is a written agreement.

A Judge's order, containing the terms of reference, may be obtained, in the first instance, on a consent, signed by the attorneys in the cause; and a rule on such order, is made out by the Prothonotary, as before mentioned.

On a consent signed by the attorneys.

When a cause is referred at the assizes, a verdict is usually taken for the Plaintiff, subject to the reference; and it is always advisable to take a verdict, on referring a *bailable* action, for, otherwise, the bail would be discharged, unless they are consenting parties (b). To obtain a rule of reference, at the assizes, counsel on both sides are instructed, to consent to a verdict, subject to a reference,

On the trial.

(a) As to arbitration in general, see stat. 9 & 10, W. 3, c. 15; Tidd's Pr. [9th Ed.], 819, & seq.; Arch. [by Chitty] 1022; and Chitty's gen. Prac. vol. 2, part 1, pa 73 to 126. And for practical forms see Id. 88, and seq.

(b) See 2 Saund. 72 b. 1 Sell. Pr. 467. Archer v. Hale, 4 Bing. 464; Aldridge v. Harper, 10 Id. 118.

the terms whereof, and the arbitrator's name, are indorsed on the briefs, which, when the motion is made, are handed to the Prothonotary, who makes out the rule accordingly, and delivers a duplicate thereof, to each party.

Usual terms of reference. The usual terms of reference, on a trial, will appear from the form of the rule, below (c) ; which rule contains many of the provisions common in the other modes of reference, before mentioned.

(c) *Assize Rule of Reference.*

Lancashire to wit.

At the session of assizes holden at [Lancaster], in and for the County Palatine of Lancaster, on [Saturday] the [twenty-sixth] day of [March] in the [sixth] year of the reign of his Majesty King William the Fourth, before [Thomas Lord Denman, Chief Justice], of the said Lord the King, of his Court of [King's Bench] at Westminster ; and [Sir James Parke] Knight, one of the [Barons], of the said Lord the King of his Court of [Exchequer], at Westminster, Justices of the said Lord the King, at Lancaster.

Clarendon.

A. B.) The [twenty-eighth] day of [March, 1836].

By consent of the parties, their counsel and attorneys, It is ordered by the Court, that the Jury find a verdict for the Plaintiff, damages [£200.], costs 40s., subject to be reduced or vacated, and instead thereof, a verdict for the Defendant, or a nonsuit, entered, according to the award hereinafter mentioned ; and that all matters in difference in this cause, [or, "that all matters in difference,"] between the said parties, be referred to the award, order, arbitrament, final end, and determination of E. F., of in the County of Lancaster, [gentleman] so as he make and publish his award, in writing, of and concerning the premises in question, on or before the [fourth day of Easter term], now next ensuing, but with power to enlarge the time, so much longer, from time to time, as he shall think fit ; and that the said parties shall and do perform, fulfil and keep, such award, so to be made as aforesaid : And it is also ordered, by and with such consent as aforesaid, that the death of either [or, "any"] of the said parties, shall not operate as a revocation of the power and authority of the said arbitrator, to make an award of and concerning the matters, hereby referred as aforesaid [*here the special terms (if any) are usually introduced*] : And it is also ordered, by and with such consent as aforesaid, that the costs of the cause, shall abide the event and determination of the said award ; and that the costs of the reference shall be in the discretion of the said arbitrator, who shall award by whom, and to whom, and in what manner, the same shall be paid : And it is also ordered, by and with such consent as aforesaid, that the several parties to this rule, or order, or any of them, respectively, shall be examined upon oath, to be sworn, now here in Court, or before one of the Judges of this Court, or before a Commissioner for taking affidavits in the same Court, if thought necessary, by the said arbitrator. And it is also ordered, by and with such consent as aforesaid, that the said several parties to this rule, or order, do produce before the said arbitrator, all books, papers, and writings, touching or relating to the matters in difference between the parties, as the said arbitrator shall think fit ; and that any witness or witnesses shall or may be examined, upon oath, to be taken before one of the Judges of this Court,

The mode of enforcing an award, is the same in this Court, as in the Courts at Westminster; and when it is intended to proceed by attachment, a rule *nisi* for the attachment may be had from the Prothonotary (d), on the usual affidavit.

It may be proper to notice, that by the statute 3 and 4 W. IV., c. 42, s. 39, where the reference is in pursuance of a rule of Court, or Judge's order, or of a submission containing an agreement that such submission shall be made a rule, of *any of his Majesty's Courts of record*, the arbitrator's authority, shall not be revocable, by any party to such reference, without the leave of the Court, or a Judge: and the Court or Judge may enlarge the term for making the award (e). The 40th section of the same act contains a provision, in such cases, for compelling the attendance of persons, and production of documents, before the arbitrator (f): and the 41st section enacts, that witnesses, giving false evidence, shall be deemed guilty of perjury, and be punished accordingly.

or before a Commissioner for taking affidavits in the same Court: And it is also ordered, by and with such consent as aforesaid, that if either [or "any"] of the parties to this rule, or order, obstruct or prevent the said arbitrator from making an award, by affected or wilful delay, or by not attending him, after reasonable notice, and without such excuse as the said arbitrator, shall be satisfied with, and adjudge to be reasonable, then the said arbitrator may proceed *ex parte*: And it is likewise ordered, by and with such consent as aforesaid, that no writ of Error be brought by the said Defendant, and that no bill in equity be filed, or action or suit commenced or prosecuted, in any court of law, or equity, by the said parties, or either [or "any"] of them, against each other, or against the said arbitrator, for any matter relative to this arbitration, or to the award to be made in pursuance of this rule.

By the Court.

(d) Reg. Gen. Mar. Ass. 57 Geo. 3.

(e) And see *Potter v. Newman*, 4 Dowl. P. C. 504.

(f) And see *Arbuckle v. Price* 4 Dowl. P. C. 174.

Provisions of the law amendment act.

BOOK 5. CHAP. XVII.

OF PROCEEDINGS TO OUTLAWRY.

Outlawry. Outlawry in this Court has been but a rare proceeding, in modern times, owing probably to the delay occasioned by the want of more frequent returns of writs, for that purpose; but the necessity, of proceeding to outlawry against an absent co-defendant, is partially removed by the Stat. 3 & 4 W. c 42 s 8, which virtually forbids the plea of nonjoinder, where the non-joined party does not reside within the Jurisdiction : and the proceeding by *Distringas*, against an absent defendant, has also been put upon a better footing (z).

Former practice of commencing proceedings to outlawry before judgment.

Proceedings to outlawry, *before judgment*, used to be commenced by original writ, after which three writs of *Capias ad respondendum*, (viz the *Capias*, *alias Capias*, and *pluries Capias*), were issued; all of which were to be tested as of the assizes of which they issued, or were supposed to issue; and to be made returnable on the first day of different assizes : but if a sufficient interval had elapsed, since the cause of action accrued, to admit of the proper teste and return of each writ, all of them might have been sued out together (a).

Present practice.

Much of the delay, and expense, of this proceeding, is prevented by Stat. 4 & 5 W. 4 c. 62, which virtually abolishes the original writ, and authorizes the proceeding to outlawry, as well after a *Summons*, and *Distringas* thereon, as after a *Capias* (b). The 5th section of this act provides, "that upon the return of *non est inventus*, as to any "defendant, against whom such writ of *Capias* (c) shall have

(z) See ante pa. 81 & seq.

(a) Evans' Pr. C. P. L. pa. 44-5.

(b) But though proceedings to outlawry may be taken after a writ of *Summons*, yet the 14th section of the statute 4 & 5 W. IV., c. 62, provides, that nothing therein contained, shall subject any person to outlawry, or waiver, who, by reason of any privilege, usage, or otherwise, may now by law, be exempt therefrom.

(c) See ante pa. 68.

"been issued; and also upon the return of *non est inventus*, and *nulla bona*, as to any defendant, against whom such writ of *Distringas* (d) shall have issued, whether such writ of *Capias*, or *Distringas*, shall have issued against such defendant only, or against such defendant, and any other person, or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw, or waive, such defendant, by writs of *Exigi facias*, and proclamation, and otherwise, in such and the same manner, as may now be lawfully done, upon the return of *non est inventus*, to a *pluries* writ of *Capias ad respondendum*, issued after an original writ." But "no such writ of *Capias*, or *Distringas*, shall be sufficient for the purpose of outlawry, or waiver, if the same be returned, within less than fifteen days, after the delivery thereof, to the Sheriff, or other officer, to whom the same shall be directed" (e).

On the writ of *Capias* or *Distringas* being returned, as above mentioned, it is filed with the Prothonotary, upon which, writs of *Exigent* (f) and Proclamation (g) are to be issued, as formerly. The writ of *Exigent* requires the Sheriff, to cause the defendant to be exacted in five County Courts, successively, and if he shall appear, to take him, as on a *Capias*: it is made out by the party—signed by the Prothonotary—sealed, on a docket obtained from the Cursitor—and lodged with the Sheriff: and, if possible, its return should be so regulated, that five County Courts may be held, between its teste and return. The writ of Proclamation is issued, and lodged, in like manner; and it is provided by the 5th section of 4 & 5 W. 4 c. 62, "that every such writ of *Exigent*, Proclamation, and other writ, subsequent to the writ of *Capias*, or *Distringas*, shall be made returnable on a day certain, *in term*; and every such first writ of *Exigent*, and Proclamation, shall bear teste, on the day of the return of the writ of *Capias* (h), or *Distringas* (i); and every

(d) See ante pa. 81 & seq.

(e) 4 & 5 W. 4 c. 62 s. 5.

(f) See form of *Exigent*, as used in this Court, 10 Wentworth's plead. 270.

(g) See form of the writ of Proclamation, Chitty's Forms, pa. 629.

(h) The writ of *Capias* not being returnable on any particular day, the first writ of *Exigent* and Proclamation must, it seems, bear teste on the day whereon the Sheriff makes his return to the writ of *Capias*. See Tidd's Pr. [1833] pa. 99 [note d].

(i) See ante pa. 82.

"subsequent writ of Exigent, and Proclamation, shall bear "teste, on the day of the return of the next preceding writ."

Proceedings
to outlawry
after judg-
ment.

When the proceeding to outlawry is *after judgment*, the 6th Sect. of the Stat. 4 & 5 W. 4 c. 62, provides "that "after judgment given, in any action commenced by writ "of Summons, or *Capias*, under the authority of this act; "proceedings to outlawry, or waiver, may be had and taken, "and judgment of outlawry, or waiver, given, in such man- "ner, and in such cases, as may now be lawfully done, "after judgment, in an action commenced by original writ". There is, however, no express rule of this Court, regulating the proceedings to outlawry, after judgment; and reference must therefore be made, to the practice of the Courts at Westminster, on this, as well as other subjects, connected with outlawry (*j*).

Reversal of
outlawry.

The proceedings against the outlaw are by writ of *Capias utlagatum*. (*k*) And it is provided by 4 & 5 W. 4 c. 62 s. 6 "that every outlawry, or waiver, had under the "authority of this act, shall and may be vacated, or set "aside, by writ of Error, or motion, in like manner as out- "lawry or waiver, founded on an original writ, may now "be vacated or set aside."

Bail on re-
versal.

By an old rule (*l*) it is ordered, that "no outlawry "henceforth be reversed, before bail be put in, (where the "cause of action shall require it) which bail, in Judges' "absence, shall be taken by Prothonotary, who thereupon, "as also where no bail is required, if he shall see sufficient "cause of his reversal, of such outlawries, shall make *super-* "sedes, he taking for Judges' use, the fees due to them".

As to the effect of outlawry, in the County Palatine of Lancaster, see Bac. Ab. Tit. "Courts Palatinate".

(*j*) See 2 Sell. Pr. 277. Tidd's Pr. [9th Ed.] 130 & seq. Tidd's Pr. [1833] Index Tit. outlawry; Arch [by Chitty] 795 & seq. Atherton's Treat. 134. Chitt. Gen. Prac. Vol. 3, part 1, pa. 396 to 405.

(*k*) See form of *Capias utlagatum*, for this Court, 10 Wentworth's plead. 284.

(*l*) Sep. Ass. 1655.

BOOK 5. CHAP. XVIII.

OF ERROR FROM THIS COURT TO THE KING'S BENCH.

Error lies at common law, from this Court, to the King's Bench; for though this is a superior Court, yet its jurisdiction is derived from the Crown (a); but on a writ of Error this Court does not certify its jurisdiction, any more than the Court of Common Pleas at Westminster, because the Court of King's Bench takes judicial notice of such jurisdiction (b). Error to the King's Bench

The writ of Error (c) issues from the High Court of Chancery, and is directed to the Chancellor of the County Palatine, commanding him, that he give in charge to the Justices at Lancaster, that they send the record, and process, with all things touching the same, to the Chancery of Lancashire; and that the Chancellor transmit the record, to the King, at the return day, wheresoever, &c. A *mandate* on this writ is issued as in other cases, afterwards allowed by one of the Judges, and then delivered to the Prothonotary. Notice of the writ being issued, allowed, and lodged, is given to the adverse party; and if an execution has been issued, to the Sheriff also (d). Writ of Error, & mandate thereon.

By a late rule, it is ordered, that "a writ of Error shall *Supersedeas*. be deemed a *supersedeas*, from the time of the allowance" (e); but by former rule (f), "no writ of Error shall be a *supersedeas* without bail, unless some ground of Error be pointed out, at the time the writ of Error is brought to be allowed, and unless the allowance take notice thereof".

(a) Rol Ab. 745. 4 Inst. 214-218-223.

(b) 1 Saund. 74 a.

(c) See form of the writ of Error, Chitty's forms, 235. Tidd's forms, [6th Ed.] 575.

(d) Evans' Pr. C. P. L., 135.

(e) Reg. Gen. [41] Mar. Ass. 2 W. 4.

(f) Reg. Gen. Sep. Ass. 2 Geo. 4.

Bail in Error, when necessary.

The statutes requiring bail in Error, in the Courts at Westminster, expressly extend to the Courts of the Counties Palatine (g); by the last of which statutes (h) it is enacted, that "upon any judgment hereafter to be given, in any of the said Courts, in *any personal action*, execution shall not be stayed, or delayed, by writ of Error, or *superseas*, thereupon, without the special order of the Court, or some Judge thereof, unless a recognizance, with condition according to statute 3 Jac. 1, c. 8. be first acknowledged, in the same Court". The statute 3 Jac. 1, c. 8, provides, that the execution shall not be stayed, (in the cases therein mentioned), unless the party bringing the writ of Error, with two sufficient sureties, such as the Court, wherein the judgment is given, shall allow of, shall first, before such stay made, or *superseas* to be awarded, be bound unto the party, for whom such judgment is, or shall be, given, by recognizance, to be acknowledged in the same Court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the writ of Error with effect, and also to satisfy and pay, if the said judgment be affirmed, all and singular the debts, damages, and costs, adjudged, and all costs and damages to be awarded for the same delaying of execution (i). These statutes require bail for the payment of the *debts, damages, and costs*, adjudged in the Court below; and it has been decided, that they only extend to cases where such judgment has been given for the *Plaintiff*, and not where judgment is given for Defendant (j).

Amount of recognizance.

"A recognizance of bail in Error, shall be taken in double the sum recovered, except in case of a penalty; and in case of a penalty, in double the sum really due, and double the costs" (k): and "in Ejectment, the recognizance shall be in double the yearly value, and double the costs" (l).

(g) See Tidd's Pr. (9th Ed.) 1149. Arch. (by Chitty) 404.

(h) 6 Geo. 4, c. 96, s. 1.

(i) For form of recognizance, see Tidd's prac. forms [6th Ed.] 581.

(j) Freeman v. Garden, 1 Dowl. & R. 184. Duvergier v. Fellowes, 1 Dowl. P.C. 224. 7 Bing. 463 S. C.

(k) Reg. Geg. (15) Mar. Ass. 2 W. 4.

(l) Reg. Gen. (16) Mar. Ass. 2 W. 4.



Bail in Error must be taken before the Prothonotary, ^{Taking & filing recognizance, &c.} or his deputy; for the statute for taking bail before Commissioners, does not extend to bail in Error (*m*): and the Plaintiff in Error, need not be a party to the recognizance (*n*). There is no express rule of this Court, as to the time for filing the bail; but in the Courts at Westminster, it must be filed, within *four* days after the delivery of the writ of Error, to the proper officer, if it be sued out *after* final judgment, or if sued out *before*, then, within *four* days after final judgment is signed, otherwise the party succeeding in the original action, may take out execution, notwithstanding the writ of Error (*o*). Notice of bail must be given to the opposite party; and the rules as to excepting to, and justifying, bail, in the original action (*p*), apply to bail in Error. The Prothonotary is authorized to grant a rule to shew cause why the Plaintiff should not be at liberty to take out execution, notwithstanding a writ of Error (*q*).

At the return of the writ of Error, (if final judgment is entered, and bail put in and justified, in cases requiring it), the Defendant in Error may procure, from the Prothonotary, a rule absolute, for the Plaintiff in Error to transcribe the record, within *eight* days, which rule must be served on the opposite party. If the record be not transcribed, accordingly, the Defendant in Error may sign nonpros (*r*), at any time before the transcript is actually removed (*s*); and after nonpros, an execution may be issued, immediately (*t*). ^{Transcribing the record.}

Where the Plaintiff in Error intends to proceed, he must order the transcript, at the Prothonotary's office: and when prepared, it is usual for the attorney of the Defendant in Error, to examine it with the Roll. The mandate on the writ of Error, is then returned by the Prothonotary, in

(*m*) Evans' Pr. C. P. L., 136.

(*n*) Dixon v. Dixon, 2 B. & P. 443.

(*o*) Tidd's Pr. (9th Ed.) 1155. Arch. [by Chitty], 407.

(*p*) See ante pa. 95

(*q*) Reg. Gen. Mar. Ass. 57 Geo. 3.

(*r*) Evans' Pr. C. P. L., 136.

(*s*) Pitt v. Williams, 4 Dowl. P. C. 70.

(*t*) Archb. [by Chitty] 411.

the name of the Justices ; and, together with the transcript, is delivered to the Cursitor, who, in the name of the Chancellor, returns the writ of Error, and transmits the same, with the transcript, to London, to be filed in the King's Bench, where the subsequent proceedings are carried on(*u*).

Execution af- If the judgment is affirmed, execution issues from the
ter affirmance Court of King's Bench, and may be issued into any County
of judgment, in England ; and where the writ of Error is nonprossed,
or nonpros. the record is not sent back to this Court, but execution is
issued in like manner, from the Court of King's Bench (*v*).

Interest. Interest is now allowed, on all writs of Error, in personal actions, for the time that the execution has been delayed (*w*).

- (*u*) Tidd's Pr. (9th Ed.) 1160. Arch [by Chitty] 426.
- (*v*) Cowperthwaite v. Owen, & an. 3 T. R. 657.
- (*w*) 3 & 4, W. 4, c. 42, s. 30.

BOOK 5. CHAP. XIX.

OF FALSE JUDGMENT.

This Court is a Court of appeal, *after judgment*, from such inferior common law (c) Courts within the County, as are not of record, (and in which the Suitors are Judges,) by writ of *false judgment*.

It is enacted by the stat. 34, Geo. 3, c. 58, s. 1, that "no execution shall be stayed or delayed upon or by any writ of false judgment, or *supersedeas* thereon, to be sued for the reversing of any judgment, given in any inferior Court within the County Palatine of Lancaster, where the debt or damages are under *ten* pounds, unless such person or persons, in whose name or names, such writ of false judgment shall be brought, with two sufficient sureties, such as the Court (wherein such judgment is, or shall be given) shall allow of, shall first, before such stay made, or *supersedeas* to be awarded, be bound unto the party for whom such judgment is, or shall be, given, by recognizance, to be acknowledged in the same Court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of false judgment, with effect, and also to satisfy and pay (if the said judgment be affirmed, or the said writ of false judgment be not proceeded in), all and singular, the debt, damages, and costs, adjudged, and all costs and damages to be awarded, for the same delaying of execution." The language of this act, is similar to that of the stat. 3 Jac. I, c. 8, (extended by 6 Geo. IV., c. 96, s. 1.) requiring bail in error (d). The recognizance must be taken by the proper officer of the Court below (e): and the form of it, is similar to that on a writ of Error (f).

(c) This does not apply to Courts of Conscience. *Scott v. Bye* 2 Bing. 344.

(d) See ante pa. 300.

(e) See ante pa. 240.

(f) See ante pa. 300.

Writ of false
judgment.

The writ of false judgment is issued, of course, from the Chancery of the County, made out by the Cursitor, tested, on the day of issuing, and returnable as other writs for the removal of causes to this Court (g). It is directed to, and lodged with, the Sheriff; and if it be to review a judgment of the County Court, it is in the nature of a *Recordari*, commanding the Sheriff that he cause to be recorded, the *Plaint*, which is in that Court, between the parties; and that he have that record before the Justices at Lancaster, on the return, under his seal, and the seals of four lawful men, of the same County, of those present at that record: and that he summon the defendant [in false judgment] that he be then, there, to hear that record. If the writ be for the purpose of reviewing the judgment of a Hundred, or other Court, it contains an *accedas* clause; and commands the Sheriff, that, taking along with him, four discreet and lawful men, of his County, in his own proper person, he go to the Wapentake, or other Court, and in open Court there, cause to be recorded, the *plaint*, which is there, without the King's writ; and that he have that record, at the return, &c.

When a su-
persedeas.

When a recognizance is not necessary, as before stated, the writ of false judgment operates, at common law, as a *supersedeas* of execution, from the time of service (h).

Return.

To this writ, the Sheriff makes his return, which is filed with the Prothonotary: and it is not necessary to return the original entry of the proceedings in the Court below, but merely a statement of such proceedings (i).

Filing the
writ, and as-
signing errors

The time for filing the writ of false judgment, and *assigning Errors*, is regulated by a late rule (j), by which it is ordered, that "the Plaintiff, or Plaintiffs, in every writ of false judgment, shall, within *eight* days (exclusive) "after the return thereof, file such writ, and assign the "Errors formally in writing, and give notice thereof, to

(g) Ante pa. 242-3.

(h) Tidd's Pr. [9th Ed.] 1187.

(i) Dyson v. Wood 3 B & C 449: and for the form of such return, in false judgment from the County Court of Lancashire, to this Court, see Tidd's forms [6th Ed.] 648.

(j) Reg. Gen. (8) Aug. Ass. 2 W. 4.

"the Defendant, or Defendants, his or their attorney, or agent; or in default thereof, a writ of Execution of Judgment may issue, to remand the cause". The assignment of Errors is in the nature of a declaration, and must be signed by counsel; and forms adapted to particular cases, are referred to, below (*k*).

The writ of *Execution of Judgment* (to be issued in default of the Plaintiff's assigning Errors), is made out by the party—signed by the Prothonotary—afterwards sealed, on a docket obtained from the Cursitor—and directed to, and lodged with, the Sheriff, or steward of the Court below (*l*). If execution be not done on the first writ, an *alias* may issue, and afterwards a *pluries*, if necessary; and if no reasonable cause be shewn, for not obeying the writ, an attachment may issue (*m*). Writ of execution of judgment.

The Defendant in Error must plead, or join in Error, within eight days next after notice of the assignment of Errors (*n*), or in default thereof, judgment may be signed; and the Court, upon application, will reverse the judgment below. When the joinder is filed, the Errors stand for argument, of course, at the following assizes: and the record is prepared, and brought into the Prothonotary's office—the issue entered with the marshal—paper books delivered to the Judges, and Counsel—and a day fixed for argument—in the same manner, as on a demurrer (*o*). Proceedings after assignment of errors.

If the Plaintiff in Error do not set down the Errors for argument, the Defendant in Error is entitled to have the judgment affirmed. Affirmance of judgment.

(*k*) Where the Error is, that it does not appear from the declaration, in the Court below, that the cause of action arose within the inferior jurisdiction, see form of assignment 10 Went. pa. 2, drawn by *Le Blanc*. Where the Error is, a variance between the process of the County Court, and the declaration, see *Newton v. Lockett*, assignment (filed in this Court, 19th Sep., 1828,) drawn by *Patteson*. And for the form of an assignment of Errors, for various causes, see *Tidd's forms* [6th Ed.] 651. See also 2 Sell. Pr. 423 to 427, for forms of proceedings.

(*l*) See the form of such writ after a judgment in the County Court of Lancashire, 10 Went. pa. 271, and after a judgment in the Hundred Court of West Derby Id.

(*m*) 10 Went., 270 note.

(*n*) Reg. Gen. Aug. Ass., 38 Geo. 3.

(*o*) See ante pa. 136 and seq.

judgment affirmed, to procure which, he must move the Court, upon an affidavit, properly intituled, (*p*) shewing that the Errors stood for argument, and that the Plaintiff has neglected to enter them (*q*).

Costs.

With respect to *costs*, the general rule is, that they are not recoverable on a writ of false judgment (*r*); but an exception has been made to such rule, in this Court, it having been held, that where a recognizance has been entered into, pursuant to statute 34 Geo. III, c. 58 (*s*), the Court has a discretion to give costs. This was decided in a case (*t*) which came before the late *Mr. Baron Wood*, on a writ of false judgment, in an action of assumpsit, by *Justices*, in the County Court of Lancashire, for a sum under ten pounds, in which cause judgment was given for the Plaintiff in that Court, for £9. 1s. 6d. damages, and £11. 8s. 3d. costs; and this Court, after hearing counsel on both sides, held, that as the recognizance had been entered into, the statute, by necessary inference, gave the power to award costs, which were ordered accordingly.

Execution after affirmance.

After an affirmance of the judgment, an execution may be issued from this Court, as in other cases. The execution recites the former judgment, the removal of the proceedings to this Court, the affirmance, and the costs given thereon (*u*).

Restitution after reversal.

On a reversal of the judgment, the Plaintiff in error is entitled to a writ of *restitution*, which must, in some cases, be preceded by a writ of *Scire facias quare restitutionem non* (*v*).

(*p*) Affidavits in a proceeding by false Judgment must be intituled thus—A. B., [the plaintiff in Error] v. C. D., [the defendant in Error] though the latter be the plaintiff below. *Watson v. Walker*. 8 Bing. 315.

(*q*) *Branthwaite v. Bromley Lanc. Mar. Ass.*, 1829 See *Impar lance Book*, entry No. 804, Aug. Ass., 9 Geo. 4.

(*r*) *Tidd's Pr.* [9th Ed.] 1188.

(*s*) See ante pa. 303.

(*t*) *Wrigg & an. v. Marston, Lancaster, Aug. Ass.*, 1807. See *Impar lance Book*, entry No. 318 Lent Ass. 47 Geo. 3.

(*u*) For the form of an execution from this Court, after an affirmance of a judgment obtained in the County Court of Lancashire, see 10 *Went.* 273

(*v*) See. *Arch. by [Chitty]* 421. 2 *Sell. Pr.* 387.

BOOK 5. CHAP. XX.

OF ERROR FROM INFERIOR COURTS TO THIS COURT.

This Court is also a Court of appeal, from the judgments In what cases. of inferior Courts of *record*, (as Borough Courts,) within the County, by *writ of Error*; which writ lies in the same cases, and may be brought by and against the same parties, and within the same period, as is allowed by the practice of the Courts at Westminster. The writ of false judgment (already treated of), bears a near resemblance to the writ of Error; and the proceedings in both cases, are, in many respects, the same.

The statute 34 Geo. III., c. 58, requiring a recognizance Recognizance. to be entered into, on a writ of false judgment, (so as give to that writ, the effect of a *supersedeas* (a), does not, it seems, extend to a writ of Error; and the statute 6 Geo. IV., c. 96, would seem to be confined to Error, in the Courts at Westminster, and in the superior Courts of record of the Counties Palatine (b): but, by statute 19 Geo. III., c. 70, s. 5, it is provided, that no execution shall be stayed, upon, or by, any writ of *Error*, or *Supersedeas* thereon, to be sued for the reversing of any judgment, given in *any inferior Court of record*, where the damages are under £10., (since extended to £20. by 7 and 8 Geo. IV., c. 71), unless a recognizance be first entered into, similar to that required on a writ of false judgment (a).

The writ of Error is an original writ, issuing out of the Writ of error. Chancery of Lancashire, directed to the Judges of the Court below, commanding, that the record, and proceedings of the plaint, be sent, with all things thereunto belonging,

(a) See ante pa. 303.

(b) See ante pa. 300

before the Justices at Lancaster, on the return. This writ is obtained from the Cursitor, tested on the day of issuing, and returnable, as other writs for the removal of causes to this Court (*d*).

Proceedings
thereon.

The time for filing the writ of Error in this Court, and assigning Errors thereon, is regulated by a late rule (*e*), which directs "that the Plaintiff, or Plaintiffs, in every writ " of Error, hereafter to be issued, and returnable into this " Court, shall, within *eight* days (exclusive) after the re- " turn thereof, file such writ, and assign the Errors, formally " in writing, and give notice thereof, to the Defendant, or " Defendants, his or their attorney, or agent; and upon " the filing of every assignment of Errors, the Plaintiff, or " Plaintiffs, may issue a writ of *Scire facias ad audiendum* " *errores*, returnable on the next monthly return, and pro- " ceed in the suit, according to the present practice of this " Court". If the writ of Error be not filed in due time, a *procedendo* may be issued (*f*).

Scire facias
ad audien-
dum errores.

The writ of *Scire facias ad audiendum errores*, issues from this Court (*g*); is tested on the day of issuing, and by the rule above recited, is required to be made returnable, on the next monthly return; it is directed to the Sheriff, commanding him, to summon the Defendant in Error, who should appear on the return, or in default thereof, the Court, on application, will reverse the judgment. The Defendant having appeared, the subsequent proceedings are the same, as on a writ of false judgment (*h*).

(*d*) See ante pa. 242-3.

(*e*) Reg. Gen. [7] Aug. Ass. 2 W. 4.

(*f*) Reg. Gen. Sep. Ass. 1655.

(*g*) See form of Writ, in K. B. 2 Sell. 418.

(*h*) See ante pa. 305.

BOOK 5. CHAP. XXI.

OF RULES, SUMMONSES, ORDERS, ETC.

SECT. 1.

Although many of the rules incidental to the progress of a suit, have been already treated of, a few general observations on the subject of rules, summonses, and orders, may not be considered superfluous.

All rules are issued by the Prothonotary, and are obtained from him, either in the first instance, or on a Judge's order procured at chambers, or, on a motion, made in Court. And it may be proper to observe, that where a rule may be had from him, in the first instance, whether *nisi*, or absolute, the more expensive course, of applying to the Court, or a Judge at chambers, ought not to be taken: for if so, the application may possibly be refused (*a*)—or the costs of it, disallowed (*b*),—or, at all events, such costs only, would be allowed, as on the less expensive mode of obtaining the rule (*c*). Rules granted by the Prothonotary.

The Prothonotary has been empowered, by general rules of Court, made from time to time, (*d*) to issue, upon application of the parties, certain rules *nisi*, and *absolute* in the first instance; and he is authorized to grant rules and orders, in many of the ordinary cases, where, according to the practice of the Courts at Westminster, an application to a Judge would be necessary. Absolute and *nisi*.

(*a*) *Bassett v. Giblett*, 2 Dowl. P. C. 650.

(*b*) *Wright v. Cross*, Id. 651, note (*a*).

(*c*) *Vaughan v. Trewent*, Id. 299.

(*d*) And see Reg. Gen. (1) Mar. Ass. 5 W. 4, ante pa. 52, & 230, note (*u*).

Rules *absolute* granted by the Prothonotary, in the first instance.

He has either been *expressly authorized*, or *accustomed*, to grant, the following rules *absolute*, in the first instance, viz. :—

To amend declaration *before* plea (*d*).

Amend declaration *after* plea, on payment of costs, giving the Defendant the same time to plead *de novo*, as he had originally (*e*).

Amend pleas; by adding or substituting a plea of payment, or further payment, of money into Court, or of set-off, or both; the Defendant undertaking to go to trial at the following assizes (*f*).

Bring in the body (*e*).

Consent rules in ejectment (*d*).

Declare (against a prisoner) within fourteen days—or to proceed to final judgment—or to charge the Defendant in execution (*g*).

For the discharge of a prisoner, for want of a declaration, on or before the *third* day of the assizes—or on account of the Plaintiff's not declaring within fourteen days—or not proceeding to final judgment, or execution (*g*)—or on the Defendant's having put in, and perfected, special bail (*h*).

To discontinue the action, before or after plea (*d*).

For further time to declare (*d*).

Further time (eight days) for a Defendant to plead, on his undertaking to go to trial, at the following assizes (*i*).

Further time for a Plaintiff to reply (*j*).

Further time (eight days) for a *Plaintiff in replevin*, to plead in bar, rejoin, or file any other subsequent pleading, on his undertaking to plead issuably, rejoin gratis, and take short notice of trial for the following assizes, and not to bring a writ of Error for delay (*k*).

(*d*) This reference (*d*) denotes such rules absolute, as the Prothonotary has *customarily* issued, without any express authority to do so.

(*e*) Reg. Gen. Mar. Ass., 52 Geo. 3.

(*f*) Reg. Gen. [16] Mar. Ass. 5 W. 4.

(*g*) Reg. Gen. Aug. Ass. 52 & 54 Geo. 3.

(*h*) Reg. Gen. Mar. Ass., 33 Geo. 3.

(*i*) Reg. Gen. (2) Aug. Ass., 2 W. 4.

(*j*) Reg. Gen. Mar. Ass., 57 Geo. 3.

(*k*) Reg. Gen. Mar. Ass. 58 Geo. 3.

- To join landlord and tenant, in defending actions of ejectment (*d*).
 For judgment to be entered, on a warrant of attorney, above a year old (*d*).
 To perfect bail (*d*).
 Plead several matters (*l*) in certain cases (*m*).
 Return the writ (*l*).
 For a Special Jury (*n*).
 To stay proceedings on a recognizance of bail, upon payment of costs (of the writ and service, and affidavit of service, if made), on the Defendant being surrendered, and notice thereof given, within eight days (inclusive) of, and next after, the service of the writ of Summons, against the bail (*o*).
 Sue or defend by guardian (*d*).
 Surrender a Defendant, in discharge of his bail (*p*).
 Tax any bill of costs, delivered by an attorney to his client, upon the usual undertaking, provided the application for such rule be made, within twenty-eight days after the delivery of the bill (*q*): and for a Plaintiff's attorney to deliver to a Defendant, who has paid the amount of debt and costs indorsed on process, a signed bill of costs, for the purpose of getting it taxed (*r*).
 Transcribe record (*d*).
 For a View (*n*).

Rules *absolute* granted by the Prothonotary, in the first instance.

The Prothonotary also issues the following rules, *to shew cause* before one of the Judge's of this Court, viz.:—

Rules *to shew cause*, granted by the Prothonotary.

- To admit written or printed documents (*s*).
 Amend particulars of demand, or set-off, on payment of costs (*t*).

- (*d*) See note (*d*) last page.
 (*l*) Reg. Gen. Mar. Ass. 52 Geo. 3.
 (*m*) In what cases a rule *nisi* only, can be had, in the first instance, see ante pa. 128.
 (*n*) Reg. Gen. Mar. Ass. 57 Geo. 3.
 (*o*) Reg. Gen. [10 & 11] Mar. Ass. 5 W. 4.
 (*p*) Reg. Gen. Mar. Ass. 52 Geo. 3.
 (*q*) Reg. Gen. (57) Mar. Ass. 2 W. 4.
 (*r*) Reg. Gen. (47) Mar. Ass. 2 W. 4, and see ante pa. 58.
 (*s*) Reg. Gen. [18] Mar. Ass., 5 W. 4.
 (*t*) Reg. Gen. Aug. Ass. 54 Geo. 3.

Rules to show
cause, granted
by the Prothonotary.

To amend any pleading, or proceeding, whatever, in the course of a suit (v).

For an attachment, for non-performance of an award, undertaking, or rule of Court; or, for non-payment of costs, or money, pursuant to the Prothonotary's allocatur (v).

To compute principal and interest on a bill of exchange, or promissory note (w).

For costs of suit, in an action on a judgment (v).

To enter up judgment, on a warrant of attorney above ten years old (r).

Enlarge the time for the Sheriff to make his return to any writ, in pursuance of a rule of Court (v).

For further time [twenty-one days] to plead, in certain cases (r).

Particulars, or further particulars, of the Plaintiff's demand (v).

Particulars, or further particulars, of a Defendant's set-off (v).

To plead several matters, in certain cases (y).

Pay over to the Plaintiff, money deposited with the Sheriff, and paid into Court, under stat. 43 Geo. III, c. 46, s. 2 (v).

Repay such money to the Defendant, he having put in and perfected bail, in the action (v).

For a Plaintiff to give security for costs (z).

To set aside a judgment of nonpros, or an interlocutory judgment, or any other proceeding, for irregularity. (v).

Stay proceedings upon an attachment against the Sheriff, for not bringing in the body (v).

Stay proceedings, on the Defendant's undertaking to pay a certain sum, on a certain day, as the debt for which the action is brought, with costs (w).

(v) Reg. Gen. Mar. Ass. 57 Geo. 3.

(w) Reg. Gen. Mar. Ass. 52 Geo. 3,

(x) Reg. Gen. Aug. Ass. 49 Geo. 3, see ante pa. 125.

(y) Reg. Gen. [15] Mar. Ass. 5 W. 4. see ante pa. 128.

(z) Reg. Gen. [19] Mar. Ass. 5 W. 4.

To stay proceedings, on an assignment of bail bond, upon payment of costs, special bail having been filed, with the usual affidavit of justification annexed (a). The like, on the Defendant having been surrendered, in discharge of his bail (b). Rules to shew cause, granted by the Prothonotary.

Stay proceedings on recognizance of bail, on the Defendant's being surrendered in discharge of such bail, within four days inclusive of; and next after, the return of the *scire facias*, returned *scire feci*, or *alias scire facias*, returned *nihil* (a).

Strike out any counts, pleas, avowries, or other pleading, in the course of a cause (c).

Take out execution, notwithstanding a writ of Error (d).

For a Writ of trial before the Sheriff, &c. (e).

The rule to shew cause (f), is made returnable, in London, or on the circuit, if the Judges be on the circuit: in the former case, before the chief Justice of this Court; and in the latter, before the other assize Judge. The time for showing cause varies according to the nature of the application; but in ordinary cases, it is generally about five days after the issuing of the rule. Rule to shew cause.

Service of the rule must be on the opposite attorney, if an attorney be employed; or on his agent at Preston, if the attorney reside elsewhere (g): and "service of rules, and orders, and notices, if made before nine at night, shall "be deemed good, but not if made after that hour" (h). It is not "necessary to the regular service of a rule, that Service.

(a) Reg. Gen. Mar. Ass. 52 Geo. 3.

(b) Reg. Gen. [17] Mar. Ass. 5 W. 4.

(c) Reg. Gen. [19] Mar. Ass. 5 W. 4.

(d) Reg. Gen. Mar. Ass. 57 Geo. 3.

(e) Reg. Gen. [21] Mar. Ass. 5 W. 4.

(f) *Form of a rule to shew cause.*

Clarendon. [March] Assizes, [6th W. 4th]

A. B. } The day of 1836. It is ordered by the Court,
v. } that the Plaintiff [or Defendant] his attorney, or agent, do attend
C. D. } the honorable Mr. Chief Justice of this Court, at his chambers, in Serjeant's Inn, Chancery lane, London, on the day at 12 o'clock at noon, to shew cause why, &c.

(g) See ante pa. 33; and as to what is sufficient service in certain cases see ante pa. 190.

(h) Reg. Gen. (25) Mar. Ass. 2 W. 4.

"the original rule shall be shewn, unless sight thereof be demanded, except in cases where a party may be attached for not obeying such rule," (i).

Effect of service.

A summons (and by analogy, a rule), to shew cause, why a certain step should not be taken, and *why*, in the mean time, proceedings should not be stayed, does not, in general, operate as a stay of proceedings; though it would seem that the proceedings are stayed from the time the rule or summons is *returnable*, until otherwise ordered (j).

The party taking out any of the above rules to shew cause, must, with the same, serve a copy of the affidavit, (if any), on which it is obtained, and transmit the rule, and affidavit, together with an affidavit of service (k), to be laid before the Judge, on application for a rule absolute (l).

Procuring a rule absolute.

If cause is to be shewn in London, the rule and affidavits are sent to the London agent, who attends at the Judge's chambers, and having waited half an hour, and no person attending to oppose the application, the Judge, on an affidavit of service of the rule nisi, and of such attendance, and default (k), will order the rule to be made absolute.

(i) Reg. Gen. [26] Mar. Ass. 2 W. 4.

(j) Glover v. Watmore, 5 B. & C. 769. Redford v. Edie, 6 Taunt. 240. Wells v. Secret, 2 Dowl. P. C. 447.

(k) *Affidavit of Service of rule nisi, attendance, and default.*
In the Common Pleas at Lancaster.

Between A. B.....Plaintiff,
and

C. D.....Defendant.

E. F., of Preston, in the County of Lancaster, clerk to agent of the [Defendant's] attorney in this cause, maketh oath, and saith, that he, this deponent, did, on the day of instant, serve a true copy of the rule [or Summons] hereunto annexed, on the agent of the attorney for the [Plaintiff] in this cause, by leaving the same, at the office of the said with his clerk: and at the same time he, this deponent, shewed the said the said original rule [or Summons] [if copies of the affidavits were also served, here state that fact]: And this deponent further saith, that he did duly attend the said rule [or Summons] at the time therein mentioned, at [here mention the place, as in the rule, or Summons], but that the [Plaintiff's] attorney, or agent, did not, nor did any other person, on his behalf, attend the said rule, [or Summons], at the time therein mentioned, to the knowledge or belief of this deponent.

(l) This was expressly required by Reg. Gen. Aug. Ass. 49 Geo. 3, & Mar. Ass. 57 Geo. 3, in reference to the rules to shew cause, therein mentioned: and the practice is, in other cases, to proceed as above mentioned.

When the rule is returnable, at any place on the circuit other than one of the assize towns for this County, the papers are generally sent to the Judge's clerk, who attends to the application ; and if the rule is returnable during the assizes, the attorney or agent usually attends it.

When an order is granted for a rule absolute, the Prothonotary issues the rule accordingly, which (if intended to be acted upon (*k*), must be served forthwith, or the opposite party may proceed, as if no order had been granted (*l*).

SECT. 2.

Whenever a rule, or order, is required, which the Prothonotary is not authorized or accustomed to issue ; or which he has power to grant, but on terms only, and the party does not wish to be subject to those terms, an application must be made, on an affidavit of the circumstances, to a Judge (*m*), who will grant a summons, unless it be a case which is properly the subject of a motion to the Court, as noticed in the next section. A copy of the summons is served, at the time, and in the manner, before mentioned, respecting rules to shew cause. The affidavit on which the summons is obtained, is left with the Judge's clerk, from whom a copy may be had : but when dispatch is desirable, the party, on serving the summons, should leave, with it, a copy of the affidavit. The practice in reference to the attendance of the summons,—the procuring of an order, and a rule upon it,—and the service of such rule—is the same, as in a proceeding after a rule nisi, obtained from the Prothonotary.

(*k*) A party is not, it seems, *bound* to take an order, made upon his own application. *Macdougall v. Nicholls*, 5 Nev. & M. 366.

(*l*) *Charge v. Farhall*, 4 B. & C. 865. 7 Dowl. & R. 422. S. C.

(*m*) Although all the present Judges of the Courts of Law at Westminster, are Judges of this Court, (see ante pa. 17, and *Terns v. Fitzhugh*, 3 Dowl. P. C. 278), yet it is usual to make the application, to one of the Judges of the preceding Lancaster Assizes.

SECT. 3.

Motions.

The third mode of obtaining rules, is on *motion*, made by counsel, to the Court; and, in general, where a statute gives the *Court*, only, a power to interfere, a Judge at chambers cannot do so (n).

Motions are made, either at the *assizes* at Lancaster or Liverpool, (which is the usual mode), or before two Judges of this Court, holding a *Court*, at the chambers in *London*, for the transaction of the business of this Court. Such rules are either absolute in the first instance, or to shew cause. Of the former kind, are rules for costs of the *assizes*—to bring prisoners to the bar—for judgment against the casual ejector—and rules discharging rules nisi for judgment as in case of nonsuit. Of the latter, are rules to postpone trials—for new trials—for judgment as in case of nonsuit,—for judgment against the casual ejector, when the service of the declaration, or *pone*, has not been effected in the usual way, or the application is not made in due time,—and, on special motions of any kind, the rule generally is, in the first instance, to shew cause.

When the motion is made, the terms on which it is granted, are indorsed by the counsel, on his instructions, which are signed by him, and then delivered to the Prothonotary, who makes out the rule accordingly.

SECT. 4.

Enforcing obedience to rules.

This Court has the same power of enforcing obedience to its rules, within its jurisdiction, as the Courts of law at Westminster possess, within theirs: and by stat. 4 and 5, W. IV., c. 62, s. 32, it is provided, “that in case any rule of this Court, cannot be enforced, by reason of the non-residence of any party or parties, within the jurisdiction thereof, it shall be lawful, upon a certificate of such rule,

(n) See Arch. (by Chitty), 73.

"by the Prothonotary of this Court, and an affidavit, that
 "by reason of such non-residence, such rule cannot be
 "enforced, as aforesaid, to make such rule, a rule of any
 "one of the Courts at Westminster, if such Court shall
 "think fit, whereupon such rule shall be enforced, as a
 "rule of such Court."

An affidavit, verifying the Prothonotary's certificate, and
 of the non-residence of the party within the jurisdiction,
 should be made, in like manner, as upon an application to
 issue an execution from one of the Courts at Westmins-
 ter, on a judgment of this Court (n).

(*) See post ch. 25.

BOOK 5. CHAP. XXII.

OF COSTS.

It is not proposed, under this head, to consider the subject of costs, further than may be necessary to elucidate those rules, and points of practice, which more immediately apply to this Court; referring the practitioner, for further information, to more general, and comprehensive, treatises (a). The matters intended to be considered, in the present chapter, may be classed as follows:—1, a party's general right to costs;—2, amount of costs;—3, taxation of costs;—4, the mode of recovering them;—and, 5, security for costs.

SECT. 1.

Right to costs. The general right to costs, is the same in this Court, as in the superior Courts of common law at Westminster; and the various statutes, which have been passed from time to time, creating, or restraining such right, either from the generality of their provisions, extend to the Courts of the Counties Palatine, or, by subsequent enactments, are made to do so (b).

Rules restraining such right, in certain cases.

Actions on bail bonds.

A party's right to costs, has also been restricted, by rules of Court, in the following cases:

“Proceedings on the bail bond may be stayed, on payment of costs, in *one* action, unless sufficient reason be “shewn, for proceeding in more” (c).

(a) See Hull on costs; Tidd's Pr., [9th Ed.]; and Arch. [by Chitty].

(b) 1 Hull. 39.

(c) Reg. Gen. [18] Mar. Ass. 2 W. 4.

If a notice of declaration, in *indebitatus assumpsit*, or *Particulars of debt on simple contract*, be given, without delivering, with demand. it, full particulars of the Plaintiff's demand, if not exceeding three folios, or without delivering a statement of claim, if the particulars exceed three folios, and a Judge shall afterwards order a delivery of particulars, the Plaintiff will not be allowed any costs, in respect of any rule, summons, or order, obtained for the delivery of such particulars, or of the particulars, he may afterwards deliver (d).

We have seen (e) that where a declaration exceeds in Declarations, length, the forms prescribed by rule (13) of Aug. Ass. length of forms. 2 W. IV., no costs of the excess shall be allowed, to the Plaintiff, if he succeeds; and such costs of the excess, as have been incurred by the Defendant, shall be allowed him, and deducted from the Plaintiff's costs: and as a further check upon the length of declarations, it is ordered (f) After judgment by default. "that in all actions of *debt*, on simple contract, and *assumpsit*, after judgment by default, the Prothonotary, or "his deputy, shall, on the taxation of costs, allow, only, for "such part of the declaration, as he shall think necessary".

"No costs shall be allowed, on taxation, to a Plaintiff, Succeeding upon any counts, or issues, upon which he has not succeeded on some issues, and not "ed; and the costs of all issues found for the Defendant, on others. "shall be deducted from the Plaintiff's costs" (g). Upon this rule it has been held, that the Defendant is entitled to costs, though they exceed the Plaintiff's (h); and that where the general issue is pleaded, to a declaration containing several Counts, and a verdict is found for the Plaintiff on one Count, and for the Defendant on the others, these are such distinct issues, as to entitle the Defendant to costs of the remaining Counts (i). The Defendant, too, is entitled, not only to the costs of so much of the declaration, as is found for him, but also of so much of his *special pleas*, *briefs*, and *evidence*, as solely, or principally, relate

(d) Reg. Gen. [9] Aug. Ass. 2 W. 4. See ante pa. 122-251.

(e) See ante pa. 119.

(f) Reg. Gen. [63] Mar. Ass. 2 W. 4.

(g) Reg. Gen. [32] Mar. Ass. 2 W. 4.

(h) *Milner v. Graham* & an. 2 Dowl. P. C. 422.

(i) *Knight v. Brown*, 9 Bing. 643. *Cox v. Thomason*, 1 Dowl. P. C. 572. 2 C. & J. 498, S. C.

thereto (j); he is not, however, entitled to the general costs of the cause; nor to the expenses of his witnesses, unless their evidence applied *exclusively*, or, at all events, *substantially*, to the issues found in his favour (k); and where two Defendants employ the same attorney, who *virtually* conducts both the defences, though separate attorneys be employed *nominally*, double charges will not be allowed (l).

Pleadings in general.

Number of counts and pleas limited.

Application to strike out counts, or pleas.

But the most important modern regulations, having for their object the exclusion of unnecessary counts, and pleas, are the general pleading rules of the Courts at Westminster, of Hil. T., 4 W. IV.; and though these rules extend to all Courts of Common Law, yet their importance may justify the giving here, such of them, fully, as apply to the present subject. By these, it is ordered, that "several counts shall not be allowed, unless a distinct subject matter of complaint, is intended to be established, in respect of each; nor shall several pleas, or avowries, or cognizances, be allowed, unless a distinct ground of answer, or defence, is intended to be established, in respect of each" (m). And "where more than one count, plea, avowry, or cognizance, shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a Judge (n), (suggesting that two or more of the counts, pleas, avowries, or cognizances, are founded on the same subject matter of complaint, or ground of answer, or defence), for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the rule, be struck out, at the cost of the party pleading; whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject matter of complaint is *bona fide* intended to be established in respect of each of such counts; or some distinct ground of answer, or

(j) See Chitt. Gen. Prac. vol. 3, part. 6, pa. 477, and the cases there referred to.

(k) *Richards v. Cohen*, 1 Dowl. P. C. 533. *Lardner v. Dick*, 2 Id. 333. *Eades v. Everatt & an.* 3 Id. 687.

(l) *Nanny v. Kenrick & an.* 2 Dowl. P. C. 334. *Starling v. Cozens & others*, 3 Dowl. P. C. 782.

(m) Rule 5; and see the examples, therein given, of allowable counts, and pleas.

(n) As to the mode of applying, see ante pa. 119-127.

"defence, in respect of each of such pleas, avowries, or cognizances; in which case, he shall indorse upon the summons, or state in his order, (as the case may be), that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances, mentioned in such application, which shall be allowed" (o).

"Upon the trial, where there is more than one count, plea, avowry, or cognizance, upon the record, and the party pleading, fails to establish a distinct subject matter of complaint, in respect of each count, or some distinct ground of answer, or defence, in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him, upon each count, plea, avowry, or cognizance, which he shall have so failed to establish: and he shall be liable to the other party, for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleadings. And further, in all cases in which an application to a Judge has been made, under the preceding rule, and any count, plea, avowry, or cognizance, allowed as aforesaid, upon the ground that some distinct subject matter of complaint was *bona fide* intended to be established, at the trial, in respect of each count so allowed, or some distinct ground of answer, or defence, in respect of each plea, avowry, or cognizance, so allowed, if the Court, or Judge, before whom the trial is had, shall be of opinion, that no such distinct subject matter of complaint, was *bona fide* intended to be established, in respect of each count, so allowed, or no such distinct ground of answer, or defence, in respect of each plea, avowry, or cognizance, so allowed, and shall so certify, before final judgment, such party, so pleading, shall not recover any costs, upon the issue, or issues, upon which he succeeds, arising out of any count, plea, avowry, or cognizance, with respect to which the Judge shall so certify" (p).

Consequence on the trial, of having unnecessary counts, or pleas.

Further consequence, after an application has been made to strike out counts or pleas.

It has elsewhere been shewn, that in order to lessen the expense of proving documents, several regulations have protely been made, by which a party intending to adduce any documents in evidence, must give notice of such inten-

Documentary evidence, costs of proving when not allowed.

(o) Rule 6 Hil. T. 4 W. 4

(p) Rule 7 of Hil. T. 4 W. 4.

tion to the opposite party, and require him to admit them : and that no costs of proving the documents will be allowed, unless such notice shall have been given, and the adverse party shall have refused, or neglected, to make the admission ; or the judge shall have certified, that he does not think it reasonable to require it (p).

SECT. 2.

Amount of Costs.

Amount of " By the statute 4 & 5 W. IV. c. 62, (q) it is enacted,
costs, in gen- " that the Judges of the superior Courts of Common Law
eral. " at Westminster, or any eight or more of them, of whom
" the chief of each of the said Courts shall be three, may,
" by any rule, or order, to be from time to time after
" this act shall take effect, make such regulations, as to the
" fees to be charged, by all and every or any of the *officers*
" of this Court, and the *attornies* thereof, as to them may
" seem expedient ; and to alter the same, when and as it
" may seem fit and proper, so as such fees shall not exceed
" the fees now received ; and all such regulations shall be
" binding and obligatory on this Court, and all the officers
" and attornies of the said Court."

In actions of " Since the passing of the above act, a Rule of this Court
assumpsit, has been made, by nine Judges, (including one chief only)
debt, or cov- and promulgated with the general rules, of March assizes
enant, for a 5 W. IV., whereby it is ordered, " that in all actions of
sum not ex- " *assumpsit*, *debt*, or *covenant*, where the sum recovered, or
ceeding £20. " paid into Court and accepted by the Plaintiff in satisfac-
" tion of his demand, or agreed to be paid on the settle-
" ment of the action, shall not exceed *twenty* pounds, with-
" out costs, the Plaintiff's costs shall be taxed, in this Court,
" according to the *reduced* scale (r) of costs, in similar
" cases, in the superior Courts at Westminster, as near as
" may be, according to the practice of the Court."

(p) See further on this subject, ante pa. 151

(q) Sec. 25.

(r) See such scale, 2 Dowl. P. C. 485 & seq.

It may be observed, too, that, *in all cases*, the Prothonotary of this Court, acts upon the same scale of allowance, as the officers of the Courts at Westminster, where the proceedings are similar; and where the proceedings are peculiar to this Court, the table of fees therein used, will be a sufficient guide, as to the allowance of costs, in all ordinary cases.

The following enactments, rules, and observations, may assist the practitioner, in ascertaining the amount of charges, on particular proceedings.

It is provided by rule (45) of Mar. ass. 2 W. IV., "that *£3. 13s. 6d.*, and no more, (*s*) shall be allowed, for a bailable process, (against one defendant) including warrant, arrest, and attending to receive debt and costs; but exclusive of the Chancellor's fine (*t*), and of mileage (*u*), or agency (*v*), when the Defendant resides upwards of four (*u*) miles from the Plaintiff's attorney; and that for each additional Defendant there shall be allowed the sum of *£1. 7s. 8d.*, in which case the amount stated in the indorsement [of the writ], shall vary accordingly."

By rule (46) of the same assizes, it is ordered, "that *£2. 2s.*, and no more (*w*), shall be allowed for a serviceable process, (against one Defendant), including copy and service, and attending to receive debt and costs; but exclusive of mileage (*x*), or agency, where the Defendant resides upwards of four miles from the

(*s*) In some cases, however, the costs of the process will necessarily exceed this sum; as, where there have been writs of continuance, or where it is necessary to obtain a Judge's order, to hold the Defendant to bail; in which cases, the costs must be ascertained, and the sum indorsed on the writ, varied accordingly.

(*t*) There is now no Chancellor's fine, the stat. 4 & 5 W. 4, c. 62, having virtually abolished the original writ, in personal actions, upon which writ alone, such fine was formerly payable.

(*u*) Since the rule [2] of Mar. Ass. 5 W. 4, (to be presently noticed) the allowance for mileage, has been 1s. a mile, *for the whole distance*; but mileage is not allowed, when an officer is sent to a place where there is a resident officer; nor will the *full* mileage be allowed, when the writ might be executed at a less expense, by sending it to an agent.

(*v*) The charge for agency will depend upon circumstances.

(*w*) This sum is altered by rule [2] of Mar. Ass. 5 W. 4, see the next page: and as to extra charges, see *supra*, note (*s*).

(*x*) Which is the same as on an arrest, *supra* note (*u*).

"Plaintiff's attorney; and that for each additional Defendant, there shall be allowed the sum of five shillings; in which case the amount stated in the indorsement [of the writ], shall vary accordingly."

The foregoing rules having been made prior to the statute 4 & 5 W. IV. c. 62, it has, since that act, been provided (y.) that the same shall be applicable "to writs of Summons, *Capias*, and Detainer, issued under the authority of the said act, and to the copy of each such writ; but the sum to be indorsed for costs of each such writ, shall be as "under (z), exclusive of mileage, or agency."

(y) Reg. Gen. [2] Mar. Ass. 5 W. 4.

(z) Bill of costs for recovery of debt, in actions of *assumpsit*, *debt*, or *covenant*, commenced on or after 1st April, 1835.

Not exceeding 20l. Exceeding 20l.

<i>Summons.</i>		£.	s.	d.	£.	s.	d.
Letter to pay, before action, (if sent)	0	2	0	.....	0	3	6
Instructions to sue	0	3	4	.....	0	6	8
Writ	0	10	0	.....	0	12	0
Copy and Service	0	5	0	.....	0	5	0
Bill and Copy to indorse	0	2	0	.....	0	2	0
Attending to settle	0	3	4	.....	0	6	8
Letters and Porters	0	4	0	.....	0	4	0
					£1	9	8
					£1	19	10

<i>Capias.</i>		£.	s.	d.
Letter to pay (if written)	.....	0	3	6
Instructions to sue	.....	0	6	8
Affidavit of debt	.....	0	5	0
Writ	.....	0	12	0
Copy for defendant	.....	0	2	0
Bill of Costs and Indorsement	.....	0	2	0
Warrant	.....	0	6	0
Attending	.....	0	3	4
Attending instructing officer	.....	0	3	4
Paid caption fee (each defendant)	.....	1	1	0
Attending to settle	.....	0	6	8
Letters and Porters	.....	0	2	0
		£3	13	6

Each additional defendant, £1. 7s. 6d.

<i>Detainer.</i>		£.	s.	d.
The like charges as on a writ of <i>Capias</i> , first 6 items	[1	11	2]	
Attending to lodge the writ	.....	0	6	8
Paid fees thereon	.....	[0	2	4]
Attending to settle	.....	0	6	8
Letters and porters	.....	0	4	0
		£2	10	10]

"The costs to be from time to time, allowed, for preparing pleadings, in actions in this Court, shall be the same, as shall be allowed for preparing pleadings, of a like description, in actions in the superior Courts at Westminster" (a). The rules restricting a Plaintiff in the adoption of lengthy forms, and unnecessary counts, and pleas, are given at length, in the first section of this chapter.

As to the costs relating to a trial, at the *assizes*, it may be proper to notice several leading points, in regulating the allowance for witnesses, attorneys, briefs, and counsel. And, as regards witnesses, it may be considered, when they will be allowed,—how much they are allowed, per day,—and for what period.

It is a rule with the Prothonotary, not to allow for the attendance of a witness, who is not sworn to be material and necessary; and who is not also sworn to have been paid for his attendance,—a mere undertaking to pay, not being sufficient. But even in the face of such an affidavit, the Prothonotary exercises his own discretion, and will allow the witnesses expenses or not, as (from the nature of the case) he may think the evidence material and necessary. In general, several witnesses who are called to prove the same fact will not be allowed; but in some cases, (as, for example, where rights of way, or common, are in question,) several witnesses may properly be called to prove the same fact, and would be allowed. And if it appear that counsel have advised the being prepared with certain evidence, the Prothonotary will rather allow for it, than set his own opinion in opposition to that of counsel: nor would it be conclusive against the allowance of such evidence, that the Judge, upon argument, declared it to be inadmissible.

It will often occur, in preparing for the trial of a cause, (especially one of importance) that the attorney, according to the best of his judgment, subpoenas, and brings into Court, more witnesses than are found to be

(a) 4 & 5, W. 4, c. 62, s. 35.

necessary, at the time of trial ; but the circumstance of such witnesses not having been examined, is no objection to their allowance ; because a judge, or jury, may often be satisfied with evidence, short of what a prudent man would deem it necessary to be provided with : and the turn which causes sometimes take, or the course which the opposite party may pursue, frequently renders it unnecessary to call some witnesses, who may be in attendance (b).

Witnesses rendered unnecessary by alteration of the pleadings.

Where, after a cause is ready for trial and witnesses are served with subpoenas, an alteration is made in the pleadings, which renders some witnesses unnecessary, the party who summoned them, must make reasonable efforts to prevent their attendance, or their expenses will not be allowed, on taxation (c).

Witnesses from abroad.

A reasonable allowance will be made, for the time of a foreign witness, who is not accessible to subpoena, and will not attend without compensation (d) : but it is discretionary with the Prothonotary, (subject to the review of the Court), to allow the expenses of witnesses from abroad, when such witnesses might have been examined by commissioners, under 1 W. IV. c. 22 (e).

Witnesses solely to prove documents,

It has been shewn elsewhere, that the expenses of witnesses, called, solely to prove documents, will not be allowed, unless notice has been given, and an application made to a judge, pursuant to the rule of March assizes 4 W. IV. (f).

Amount allowed to witnesses.

The amount allowed to witnesses, is regulated by the scale in the note (g) ; upon which it may be observed, that much scope is thereby left for the discretion of the Prothonotary, who is generally guided, in such allowance, by the

(b) As to allowance for a witness not called, see *Adamson v. Noel* 2, Chitt. Rep. 200.

(c) *Allport v. Baldwin* 2, Dowl. P. C. 599.

(d) *Loneragan & an. v. the Royal Exch. Assur. Co.*, 1 Dow. P. C. 233. 7 Bing 729 S. C.

(e) *M'Alpine v. Coles*, 2 Dowl. P. C. 299. 3 Tyr. 871, S. C. nom *Macalpine, v. Powles*.

(f) See ante pa. 154-321.

(g) Allowance to witnesses, for maintenance, attendance, &c., besides

station in life, of the witness; and such discretion cannot be brought into review, as a matter of course (h).

The period for which the allowance to witnesses is made, is regulated by the time they are required to be in attendance: When the assizes were held at Lancaster only, a day was fixed by the Prothonotary, (and stated in the assize circular), for the witnesses, in the different lists, to be in Court; and all allowances for the attendance of any attorney, or witness, were made, with reference to the arrangement and progress of the business of the assizes, in pursuance of the general rules of Court, regulating the order of trial; to give effect to which rules, directions were required to be marked upon the panel, as a guide to the proper officers, on the taxation of costs (i). Since the assizes have been held at Liverpool, as well as Lancaster, no further regulation has been made, on this subject. Although allowance will not, in general, be made, for a witness's attendance, before the day he is required to attend, yet a reasonable time will be allowed for travelling

something for travelling expenses. *

Common witnesses, such as labourers, journey-							£.	s.	d.	£.			s.	d.	
men, &c. per day							0	5	0	to	0	7	6		
Tradesmen							0	10	0		0	15	0		
Yeomen and Farmers							0	10	0		0	15	0		
Auctioneers and Accountants							0	10	6		1	1	0		
Gentlemen, Merchants, Bankers, &c. †											1	1	0		
Professional men †							1	1	0		2	2	0		
Attorneys' Clerks							0	10	6		1	1	0		
Females, according to their station in life							0	5	0		1	0	0		
For Maps, &c., in the discretion of the officer.															

For Maps, &c., in the discretion of the officer.

* Since the assizes have been holden at Liverpool, the practice has been, to allow for travelling expenses, the railway fare, to and from such town, if the travelling was by that mode; or if necessarily otherwise, then 1s. per mile, one way.

† As to the allowance made to the following persons, see the cases referred to:—*Attorneys*—Collins v. Godefroy, 1 B. & Adol. 950, 1 Dowl. P. C. 326, S. C. Willis v. Peckham, 1 B. & B. 515. *Physicians and Surgeons*—Severn & ors. v. Olive & ors 3 B. & B. 75. *Merchants*—Moor v. Adam, 5 Maule & S. 156. *Brokers*—Lopes v. De Tastet, 3 B. & B. 292. *Scientific men*—Severn & ors. v. Olive & ors. supra; and *Masters of vessels*—White v. Brazier, 3 Dowl. P. C. 499. And, further, as to allowance to witnesses, coming from abroad, or detained in this country, see Sturdy v. Andrews, 4 Taunt. 697. Tremain v. Barrett, 6 Id. 88. Berry v. Pratt, 1 B. & C. 276; see also Hallet, v. Mears & an. 13 East, 15 [note]

(h) Skelton v. Seward, 1 Dowl. P. C. 411.

(i) See ante pa. 172.

Allowance to witnesses. to, and from, the assize town, according to the distance: for instance, if the witness travel from Liverpool to Lancaster, or *vice versa*, one day will be allowed, for going to the assize town, and another, for returning home, after the day of trial. It is still, however, a question for the Prothonotary, whether a witness shall be allowed for the whole time of his attendance, or only a portion of it; and when he has decided upon it, the Court will not review his decision (*j*).

In undefended causes. We have seen (*k*), that where a party is not ready to try an *undefended* cause, when it is called on, in the order of undefended causes, the trial of such cause may be postponed, till it be peremptorily called on, in the order of defended causes; but, in that case, the attorney will not be allowed the costs of attendance, of himself or his witnesses, beyond the time when the cause was first called on, in the order of undefended causes.

Searching for evidence. It is a general rule, in taxing costs between party and party, not to allow any charges for *searching* for evidence (*l*); but if a search be made at A, B, and C, and the evidence be found at C, a search at that place, if shewn to be necessary, would be allowed.

Models, &c. The Court of C. P. W. has refused the expenses of making *models*, and of compensation to scientific men, although it was sworn, that the Plaintiff could not have safely proceeded to trial, without such assistance (*l*).

Attorney's attendance. An *attorney* is generally allowed for his attendance on the trial; but where he attends as a *witness*, as well as attorney, he is not allowed in both characters; and when his *agent* is employed to conduct the trial, the allowance for such attendance, is in the discretion of the Prothonotary (*m*).

(*j*) *Platt v. Greene*, 2 Dowl. P. C. 216. *Cosgrave v. Evans*, Id. 443. *Eades v. Everatt & an*, 3 Id. 687.

(*k*) *Ante* pa. 172

(*l*) *Bayley v. Beaumont*, 11 Moore, [C. P.] 497.

(*m*) When the attorney was also a *party* to the cause, see *Leaver v. Whalley* 2 Dowl. P. C. 80.

The usual allowance, when the attorney comes from a distance, will best appear from the table subjoined (e); and which will serve as a criterion, to ascertain the amount allowed to an attorney residing at the assize town, though in such case, the length of time required for his attendance, will depend upon the arrangement and progress of the business, and the number of his cause in the list. But there are certain cases, in which the attorney is, by rules of Court, limited in the amount of his allowance; thus, by rule (60) of Mar. Ass. 2 W. IV., it is ordered, that "in all actions of *assumpsit*, or *debt on simple contract*, (whether such actions be depending in this Court, or be entered for trial, by virtue of a writ of *mittimus*, from any other Court), when the debt or damages recovered shall not exceed £20., the Plaintiff's attorney, on the taxation of costs, between party and party, shall not be allowed more than *four guineas*, for his attendance to conduct the trial: nor shall any more be allowed to him, for such attendance, as between attorney and client, unless he attend at the express request, *in writing*, of his client." (f) And by rule (61) of the same assizes, it is provided, that "no more than *four guineas* shall be allowed, to an attorney, for attending to conduct the trial of an *undefended* cause, whatever the amount of damages recovered may be, if the Defendant's attorney shall, two days (exclusive), previous to the first day of the assizes, give notice to the Plaintiff's attorney, or to his agent, of his intention not to defend." (f)

(e) *Allowance to attorneys.*

The allowance to attorneys, for attending the trial of causes, (in addition to the assize fee of £1. 6s 8d. in each cause), is as follows:

Where an attorney has one cause only (besides travelling expenses)*	£. s. d.	
Where he has two causes, (besides a moiety of travelling expenses)	2 2 0	per day.
Where he has more than two causes, (besides a proportion of travelling expenses) ...	1 11 6	per day, in each cause.
	1 1 0	per day, in each cause.

* Since the assizes have been held at Liverpool, the practice has been, to allow railway fare, to and from that town, if the attorney travelled by that mode; or if necessarily otherwise, then 1s. 3d. per mile, one way.

(f) Notwithstanding this rule, it is conceived, that an attorney residing at the assize town, would not, in all cases, be allowed, so much as *four guineas*.

Counsel. It is usual, in common cases, to allow for *two* counsel, only. In special—jury causes, and causes of value, *three* counsel are sometimes allowed; but to warrant this number, in a common jury cause, it should not only be of value, but there should be many witnesses; and those on the opposite side, should also be taken into account.

How many allowed. *Four* counsel have been allowed, in *extraordinary* cases; as in some great common, or fishery, or will, cause, where there have been many witnesses.

Their fees. The *amount* allowed, on taxation, for counsel's fees, is entirely in the discretion of the Prothonotary, who is governed by the importance of the case—the length of the briefs—and the number of witnesses. The fees allowed to the clerks of counsel, are stated below (g).

Their clerk's fees.

Consultations &c. *Consultation fees*, were not, until recently, allowed, in costs as between *party and party*; but now the Prothonotary will allow, in such costs, for one consultation, and for one opinion of counsel, as to evidence.

Briefs, allowance for. The Prothonotary allows for drawing brief, 6s. 8d., for each sheet of eight folios, and 3s. 4d. per sheet, for copying, besides a reasonable sum, for taking instructions, which is

(g) *Fees to Clerks of Counsel, as fixed by the taxing officers of the Courts at Westminster, in Hil. T. 1836. See Leg. Obs. Sess. 1835-6, pa. 214-215.*

On Briefs, Cases &c.

Upon a fee of	£.	s.	d.
1 Guinea & under 5 Guineas	0	2	6
5 Guineas 10	0	5	0
10 20	0	10	0
20 30	0	15	0
30 50	1	0	0
50 Guineas	1	5	0
Above 50 guineas, the taxing officer must exercise his discretion.			
<i>On Consultations, &c.</i>			
	£.	s.	d.
Senior clerks	0	7	6
{ But if the room is paid for by the party, the clerk's fee is.....	0	5	0
	0	5	0
Junior clerks	0	2	6
On a general retainer	0	10	6
On a common retainer	0	2	6
On conference	0	5	0

The same scale must apply equally in cases of attorney and client, as in cases of party and party.

regulated according to circumstances. In general, the same number of copies are allowed for, as there are counsel engaged for the party, in the cause : but sometimes an attorney may prepare as for a contested cause, whereas, before the trial, he may discover that it will not be so ; and if it be a case in which, had it been defended, the Prothonotary would have allowed for more counsel, he will, on an affidavit of the circumstances, allow for the copy brief, though not delivered. How many copies allowed.

It is often a question, as to the time when the costs of preparing briefs will be allowed, where the cause is settled without going to trial : and it may be observed, that in general, where there has been no treaty, nor any application for time, the joining of issue (provided it be not more than *fourteen* days before an assizes), is the proper line to draw. This, however, is alterable, according to circumstances : and an allowance will, in some cases, be made for briefs, in part prepared, though the cause is not at issue ; for it sometimes happens that by granting time, and in consequence of negotiations, the issue is not joined 'till near the time of trial ; and it would be too much to say, that so material a part of the attorney's duty, should be delayed to that late period. When briefs to be prepared.

SECT. 3.

Taxation of Costs.

After a party's right to costs is ascertained, either by judgment, rule of Court, or otherwise, they may be taxed at any time, except after a verdict at the assizes, in which case, (it being a rule (*h*), that no execution shall issue in any cause depending in this Court, and entered for trial, until the day next after the assizes shall have ended, Sundays excluded), the Prothonotary will not tax the costs, until after the actual termination of the assizes, Taxation of costs, when it may be had.

(A) Reg. Gen. Sep. Ass. 2 Geo. 4.

at Lancaster, or Liverpool (i), unless the Judge before whom the cause is tried, shall (in pursuance of a more recent rule (k),) direct, that execution may be issued during the assizes.

Costs, by
whom taxed

Costs are taxed by the Prothonotary; and either party, who is dissatisfied with his decision, may, on an affidavit stating the objections, apply to a Judge of this Court, for an order to review the taxation.

Bill of costs,
when nec-
essary.

Previous to the taxation, a bill of costs must be made out, in all cases, except on entering up judgment on a warrant of attorney, or after nonpros for want of declaration.

Appointment
to tax, when
necessary.

An appointment to tax must be served after verdict, in a cause defended on the trial; and even in an undefended cause, if the costs be not taxed within a year after trial; and the charge for an appointment will not now be allowed in any case, unless it be served. An appointment must also be served, after a rule to compute, or a rule to stay proceedings on payment of debt and costs; and indeed after a rule of any kind, where the costs are mentioned in it, to be taxed: but an appointment is not necessary, for taxing costs after a verdict, in an undefended cause, if such verdict has been obtained within a year; nor after inquiry; nor after judgment by default in an action of debt, except it be an action on a judgment, wherein an order for costs has been obtained, in which case, a rule on such order, and an appointment to tax, must be served.

Where an appointment to tax is not necessary, as above mentioned, and the opposite attorney intends to be present at the taxation, the practice is, to give notice of such intention, and then an appointment should be served.

By whom
granted, &c.

The appointment is obtained from the Prothonotary, who, (if it be to tax the party's costs applying for it), requires the bill of costs, affidavit of increase (l), (if any), briefs, and other papers, in the cause, to be left with him,

(i) See ante pa. 174.

(k) Reg. Gen. (5) Mar. Ass. 4 W. 4

(l) When such affidavit is necessary, and the form of it, see the next page.

that he may inspect the briefs, &c., previous to the taxation; and that the other party may take copies of the affidavit of increase, and bill of costs. A copy of the appointment must be served on the opposite attorney, or agent; or on the party himself, if he has not employed an attorney: and if such attorney does not reside in Preston, a time is generally appointed for taxation, which will afford him an opportunity of instructing his agent there, or of attending himself, if he should think proper. It is usual, in that case, to allow a return of post; but this is variable, according to circumstances; and if the taxation has been delayed for a considerable time, a longer period is usually allowed.

Appointment
to tax.

Service of.

It is ordered by a late rule (*m*), that "on every appointment to be made by the Prothonotary of this Court, or his deputy, the party on whom the same shall be served, shall attend such appointment, without waiting for a second: or, in default thereof, the Prothonotary, or his deputy, shall be at liberty to proceed, *ex parte*, on the first appointment."

Attendance
on.

When there are any charges in the bill, other than the common costs in the cause, an affidavit of increase should be prepared: and such affidavit is necessary, whether the cause may have been tried, or not. This ought to be particularly attended to, as delays frequently arise, either for want of an affidavit, or a sufficient one. The affidavit of increase, after a trial (*n*), is usually made by the attorney, and if made by his clerk, he must swear that he had the conduct and management of the cause. It is left with

Affidavit of
increase.

(*m*) Reg. Gen. (5) Aug. Ass. 2 W. 4.

(*n*) *Affidavit of Increase after a trial.*

In the Common Pleas at Lancaster.

Between A. B. Plaintiff,
and

C. D. Defendant.

E. F., of in the County of attorney, for the said
in this cause, maketh oath and saith, that this cause was tried at the
assizes, holden at Lancaster [*or* "Liverpool"] that he caused subpoena
to be issued on the behalf of the said and that G. H., of
gentleman, J. K., of vintner, and L. M., of husbandman,
were duly subpoenaed on behalf of the said : that the said several

the Prothonotary, on taking out the appointment to tax where an appointment is necessary, and where not, at the time of taxation.

SECT. 4.

Mode of recovering Costs.

Mode of re-
covering costs

The mode of recovering costs, as between party and party is the same in this Court, as in the Courts at Westminster: that is, by execution,—action on the judgment—or attachment, upon a rule of Court. The proceeding by execution, or action, need not be explained here: but with respect to the proceeding by

witnesses left home for Lancaster [*or* “Liverpool”], on the day of ; and that the place of abode of the said

NAMES OF WITNESSES.		MILES.		MILES.
	{ Is distant from } { this deponent's } { place of abode }		{ and from } { Lancaster [<i>or</i>] } { “Liverpool” }	

And this deponent further says, that the said several *witnesses* were all in the judgment and belief of this deponent, material and necessary witnesses, in this cause, on behalf of the said and attended the trial thereof, and were attending as witnesses in other cause, as this deponent has been informed, and verily believes; and this deponent says, that this cause was tried (*or* “referred”, *or* “withdrawn”), on the day of and that the said G. H, J. K, & L. M, were necessarily absent from their places of abode, in going to, staying at, and returning from, the said assizes, on occasion of their attending this cause, days: And this deponent further says, that he left home on the day of to attend the trial of this cause, as the *attorney* thereof, and that he was necessarily absent from his place of abode, on occasion of his attending this cause as aforesaid, days; and that he attended at the assizes, as an *attorney*, in other cause; and that his place of abode is distant from Lancaster, [*or* “Liverpool”] aforesaid, miles; And this deponent says that he delivered a *brief* in this cause, to Mr. and paid him for his fee therewith, the sum of ; and another *brief* to Mr. and paid him, for his fee therewith, the sum of : and that he also paid the following Court fees, viz: to the Prothonotary ; and to the Marshal, Crier, Jury, and Bailiff : And this deponent further says, that the several sums of money following, have been *paid* to, and for, the said *witnesses*:—that is to say,—

NAMES OF WITNESSES.	PAID THEM FOR THEIR EXPENSES.

attachment, it may be observed, that a copy of the rule (o) with the Prothonotary's allocatur of costs, must be *personally* served, on the party required to pay them (p), by the party entitled to receive them: and the original rule must, at the *same time*, be shewn, and payment of costs demanded. It is not necessary, however, that the original rule should be placed in the hands of the party: for if it be shewn to him, so that he can read the contents, it is sufficient (q). When the money is demanded under a power of attorney, a copy of such power of attorney should be served, and there must be an affidavit of the due execution of it (r). If the costs be not paid, a Judge of this Court, on an affidavit of such service, demand, and non-payment, will grant an order, (generally in the first instance), for an attachment to issue (s); or the Prothonotary, upon a similar affidavit, will grant a rule to shew cause, before one of the Judges of this Court, at chambers, why an attachment should not issue (t). The party taking out such rule to shew cause, must serve the same, on the other party, personally (u), together with a copy of the affidavit on which it is obtained; and an order, and rule absolute thereon, is procured, as in other cases (v).

SECT. 5.

Security for Costs.

Security for costs will be granted by this Court, whenever it is allowed by the practice of the Court of Common

Security for costs, in what cases granted.

(o) *Parker v. Burgess*, 3 N. & M. 36.

(p) *Woolison v. Hodgson*, 3 Dowl. P. C. 178.

(q) *Calvert v. Redfearn*, 2 Dowl. P. C. 505.

(r) *Tidd's Pr.* [9th Ed.] 837; 2 Sell. Pr. 245, and see *Laugher v. Laugher*, 1 Cr. & J. 398.

(s) The rule for an attachment for the nonpayment of costs, on the officer's allocatur, (unless it be for nonpayment of them, pursuant to an award) is *absolute* in the first instance; but where it is for nonpayment of money generally, or of money and costs, or of the amount of an attorney's bill upon the Prothonotary's allocatur, under the usual reference for taxation, it is only a rule to shew cause. 2 Hull Costs, 652. *Tidd's Pr.* [9th Ed.] 479-480, *Bray v. Yates*, 1 Dowl. P. C. 459. *Spragg v. Willis*, 2 Id. 531. *Boomer v. Mallor*, Id. 533.

(t) Reg. Gen. Mar. Ass. 57 Geo. 3, and see ante pa. 104.

(u) *Birket v. Holme*, 4 Dowl. P. C. 556.

(v) See ante pa. 314.

Security for costs. Pleas at Westminster; but when the application is made on the ground that the Plaintiff resides out of the reach of the process of the Court, it is not enough to show, that he resides out of the *jurisdiction* of the Court; but it must appear that he is *resident abroad*, (and not merely gone there for a temporary purpose (*w*)), to entitle the Defendant (*x*) to such security. It has been held, however, that a residence in *Scotland* (*y*), or *Ireland* (*z*), or the *Isle of Man* (*a*), is enough, for this purpose: but a foreign residence of *one only*, of several Plaintiffs, is not sufficient (*b*).

At what time to be applied for. "The application to compel the Plaintiff to give security for costs, must, in ordinary cases, be made before issue "joined" (*c*): and, in all cases, as soon as it can reasonably be done, and before a fresh step is taken, after knowledge of the Plaintiff's residence abroad (*d*). Hence, where the Defendant pleaded, after knowing of the Plaintiff's absence, security has been refused (*e*): but it is not too late to apply, after a rule for time to plead (*f*); and it is for the Plaintiff to shew, that the application is too late (*g*).

Mode of applying. The application to the Court, for such security, should be preceded either by an application to the party, or notice; otherwise the rule nisi, will not operate as a stay of proceedings (*h*), and will only be made absolute, on payment of costs (*i*).

(*w*) *Taylor v. Fraser*, 2 Dowl. P. C. 622 *Gurney v. Key*, 3 Id. 559. *Frodsham v. Myers*, 4 Id. 280.

(*x*) A Defendant in replevin is liable to give such security. *Selby v. Cruchley*, 1 B. & B. 505.

(*y*) *Baxter v. Morgan*, 6 Taunt. 379.

(*z*) *Fitzgerald v. Whitmore*, 1 T. R. 362.

(*a*) *Bohrs v. Sessions*, 2 Dowl. P. C. 710.

(*b*) *Anon.* 2 Cr. & J. 88, 2 Tyr. 167. note (*a*).

(*c*) *Reg. Gen.* (34) Mar. Ass. 2 W. 4.

(*d*) *Duncan v. Stint*. 5 B. & Ald. 702. *Bohrs v. Sessions*, 2 Dowl. P. C. 710. but see *Fletcher v. Lew*, 5 Nev. & M. 351, as to the discretion of the Court, in this case.

(*e*) *Brown v. Wright*, 1 Dowl. P. C. 95.

(*f*) *Wilson v. Minchin*, 1 Dowl. P. C. 299. 2 C. & J. 87, S. C. 2 Tyr. 166. *Gurney v. Key*, *supra*.

(*g*) *Jones v. Jones*, 1 Dowl. P. C. 313. 2 C. & J. 207, S. C.

(*h*) *Id. Adams v. Brown*, 1 Dowl. P. C. 273.

(*i*) *Bohrs v. Sessions*, 2 Dowl. P. C. 710.

The Prothonotary is empowered to grant a rule to shew cause why a Plaintiff should not give security for costs (*j*), which rule must be served, and a rule absolute obtained, as in other cases (*k*).

(*j*) Reg. Gen. (19) Mar. Ass. 5 W. 4.

(*k*) See ante pa. 314.

BOOK 5. CHAP. XXIII.

OF AFFIDAVITS.

Affidavits
used in this
Court, before
whom sworn.

Affidavits to be used in this Court must be sworn either before one of the Judges of the Court, or a Commissioner authorized to swear affidavits, by virtue of the stat. 17 Geo. 2, c. 7 (a) : or, if the affidavit be to hold a Defendant to bail, it may be sworn before the officer who issues the process, or his deputy (b) : but it is provided by a late rule (c), that "no affidavit shall be received or filed, if it "be sworn before the Plaintiff's attorney, whether he be, "or be not, the attorney on record ; and that an affidavit "sworn before an attorney's clerk, shall not be received, in "cases where it would not be receivable, if sworn before "the attorney himself ; but this rule shall not extend to "affidavits to hold to bail."

When the affidavit is made at the assize town, during the assizes, the practice is, to have it sworn before one of the Judges : and affidavits made in Ireland, Scotland, or elsewhere, abroad, if not sworn before a Commissioner of this Court, must be verified in like manner, as is required by the practice of the Courts at Westminster (d).

General re-
quisites in
affidavits.

With respect to the requisites of affidavits, in general, it may be observed, that the regulations of the Courts at Westminster, relating thereto, are acted upon in this Court : and the following useful hints on this subject are suggested by Mr. Chapman, who observes (e), that care should be taken, that the deponent is described in

(a) See ante pa. 34.

(b) See statute 12 Geo. 1, c. 29, s. 2 : and as to who is a sufficient deputy for this purpose, see *Hughes v. Jones*, 1 B. & Adol. 388.

(c) Reg. Gen. (4) Mar. Ass. 2 W. 4.

(d) See *Tidd's Pr.* [9th Ed.] 166-181. Arch. [by Chitty] 282. 1 Chitt. Rep. 464, (note). *Sharp v. Johnston*, 2 Bing. N. C. 246 ; and see ante pa. 65.

(e) See *Chap. K. B. Pr.* [2nd Ed.] 94-95.

the affidavit, by his true place of abode, and addition (*f*)—that all affidavits are intituled in the Court, and with the christian and surnames of all the parties to the suit (*g*)—that in the jurat, the day, year, and place, when and where the affidavit is sworn, are inserted:—that there is no interlineation, or erasure in the jurat (*h*)—that if there be two or more deponents, their respective names be written in the jurat⁽ⁱ⁾:—that if the deponent be an illiterate person (as appears by making a mark instead of signing the name), the Commissioner certify in the jurat, “that the affidavit was read over to the deponent, in his presence, and that the deponent seemed perfectly to understand the same, and made his mark in his presence”—and that no affidavit (except an affidavit to hold to bail) be sworn before the attorney of the *party*, on whose behalf the affidavit is made.

(*f*) See Reg. Gen. (3) Mar. Ass. 2 W. 4, ante pa. 65; and see *Lawson v. Case*, 1 Cr. & M. 481. *Jervis v. Jones*, 4 Dowl. P. C. 610.

(*g*) *Masters v. Carter*, 4 Dowl. P. C. 577. *Harris v. Mathews*, Id. 608. But there is an exception to this rule, in affidavits to hold to bail, which must not be intituled with the parties' names, but only in the Court out of which the process issues; Chap. Pr. pa. 94. As to describing a Defendant by initials, &c. in an affidavit of debt, see ante pa. 65.

(*h*) See *Williams v. Clough*, 1 Ad. & El. 376; but see *Austin v. Grange*, 4 Dowl. P. C. 576.

(*i*) *Houlden v. Fasson*, 6 Bing. 236.

BOOK 5. CHAP. XXIV.

OF THE *Scire facias* TO REVIVE A JUDGMENT.

When execution is not issued within a year and a day after final judgment, the judgment must be revived, by *Scire facias*, before an execution can be issued : and where the judgment is in *debt*, and the costs have not been taxed, the practice is, to tax them, before the issuing of the *Scire facias*.

Writ of *Scire facias*.

The *Scire facias* (see form below (a)), is made out by the party, signed by the Prothonotary, afterwards sealed,

(a) *Writ of Scire facias, to revive a Judgment.*

William the Fourth, &c., to the Sheriff of Lancashire greeting : whereas A. B., lately in our Court, before our Justices at Lancaster, to wit, at the session of assizes, there holden on the day of in the year of our reign, Before &c. [*as in the record of the judgment*], by the consideration and judgment of the same Court, * recovered against C. D. £ which to the said A. B. in the same Court, were adjudged for his damages, which he had sustained, as well on occasion of the not performing of certain promises and undertakings, then lately made, by the said C. D., to the said A. B., in your County, as for his costs and charges, by him, about his suit, in that behalf expended, [*or if the action be in debt, then instead of the words after the asterisk, say "recovered against the said C. D. as well a certain debt of £ as £"*] which to the said A. B. in our same Court, were adjudged for his damages, which he had sustained by occasion of his detaining that debt,"] whereof the said C. D. is convicted, as by the record and proceedings thereof, remaining in our said Court, before our Justices at Lancaster aforesaid, manifestly appears ; yet execution still remains to be made, as by the information of the said A. B., in our same Court, we have been given to understand : and because we are willing, that those things which in our said Court, are rightly done, and transacted, should be duly carried into execution, we command you, that by honest and lawful men, of your bailiwick, you make known to the said C. D., that he be before our Justices at Lancaster, on [*any of the monthly returns, or on the the first or last day of the assizes, next after fifteen days from the teste of the writ*] to shew, if he hath, or knoweth, of any thing, to say for himself, why the said A. B. ought not to have execution against him, for the damages, [*or "debt and damages"*] aforesaid, according to the form and effect of the said recovery, if it shall seem expedient for him ; and have there, the names of those by whom you shall so make known to him, and this writ. Witness [*the Chief Justice*] at Lancaster, the [*day of issuing*], in the year of our reign.

E. F., Attorney. Clarendon.

and then lodged with the Sheriff, who grants a warrant thereon. It is tested on the day of issuing, and may be made returnable, either at the assizes, or on a monthly return (b), and, it would seem, there must still be, as formerly, fifteen days between the teste and the return (c).

The practice used to be, to issue two successive writs of *Scire facias*, both of which were returned *nihil*, without being served; an *entry* was then filed with the Prothonotary, of which no notice was given to the opposite party: and if an appearance was not entered at the following rule day, judgment might then be signed, and an execution issued, provided the entry was filed, fourteen days previously. This practice has lately been altered; and now, "it shall not be necessary to sue out more than one writ of *Scire facias*, for the purpose of reviving a judgment; but a copy of the warrant, granted by the Sheriff, upon such writ, shall be *personally* served: and in case an appearance be not entered at the return of such writ, or within eight days next after, the Plaintiff may, upon an affidavit of such service, and of the amount due, be at liberty to sign judgment, and issue an execution: provided always, that judgment may be signed, by leave of a Judge, after a return of *nihil*, to one *Scire facias*" (d).

Former practice.
Present practice.

The Plaintiff, on signing judgment, pursuant to the above rule, must file an *entry* with the Prothonotary, a form of which is subjoined (e).

(b) See ante pa. 43.

(c) As to the former practice, see Evans' Pr. C. P. L. 110: 2 Sell. Pr. 197; and as to the present practice, see Arch. [by Chitty] 697, and seq. and Peacock v. Day, 3 Dowl. P. C. 291.

(d) Reg. Gen. (20) Mar. Ass. 5 W. 4.

(e) *Entry on Scire facias, after the return of scire feci, and default of Defendant.*

In the Common Pleas at Lancaster.

The day of A. D. 1836.
Lancashire to wit, } The Sheriff is commanded, that whereas A. B.,
Division. } lately in the Court of our Lord the King, before his
Justices, here at Lancaster, to wit, at the session of assizes, here holden, on
the day of in the year of his [present] Majesty's reign,
Before, &c. [as in the *scire facias*] by the consideration and judgment of
the same Court, recovered against C. D., £ , which to the said A. B.,
in the same Court, were adjudged for his damages, which he had
sustained, as well on occasion of the not performing of certain promises and undertakings, then lately made, by the said C. D., to

Further proceedings. "A Plaintiff shall not be allowed to quash his own writ of *Scire facias*, after a Defendant has appeared, except "on payment of costs" (f), for which purpose, a rule nisi only, will be granted, in the first instance (g). As to further proceedings after appearance, see ante p. 224.

Costs. By the Stat. 3 & 4 W. 4, c. 42, s. 34, it is provided, that in all writs of *Scire facias*, the Plaintiff, obtaining judgment, on an award of execution, shall recover his costs of suit, upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined.

the said A. B., in the said County, as for his costs and charges by him, about his suit in that behalf, expended. [or, *if in debt, recite the writ of Scire facias, accordingly*], whereof the said C. D., is convicted, as by the record, and proceedings thereof, remaining in his Majesty's said Court, before his Justices here at Lancaster aforesaid, manifestly appears; yet, execution still remains to be made, as by the information of the said A. B., in his Majesty's same Court, our said Lord the King, hath been given to understand: and because, &c., that by honest, &c., he should make known to the said C. D., that he be before his Majesty's Justices at Lancaster, on [the day of the return], to shew, if he hath, or knoweth, of any thing, to say for himself, why the said A. B. ought not to have execution, against him, for the damages, [or "debt and damages"] aforesaid, according to the form and effect of the said recovery, if, &c.: at which day here cometh the said A. B. in his proper person, and the said Sheriff now here returneth, that by E. F., and G. H., honest and lawful men, of his bailiwick, he has given notice to the said C. D., to be before his Majesty's Justices, here, at Lancaster, on the day in the said writ mentioned, to shew cause, as by the said writ the said C. D. is required, as by the said writ, the said Sheriff was commanded: and the said C. D., although solemnly demanded, cometh not; and hereupon the said A. B., prayeth execution against the said C. D., of the damages [or "debt and damages"] aforesaid, according to the force, form, and effect of the said recovery, to be adjudged to him, &c. Therefore it is considered, that the said A. B. have execution against the said C. D., of the damages, [or "debt and damages"] aforesaid, according to the force, form, and effect of the said recovery, by the default of the said C. D., &c. It is also considered, by the Court here, that the said A. B. do recover against the said C. D., £ for his costs and charges, by him about his suit in this behalf, by the said Court, now here adjudged to the said A. B., and with his assent, according to the form of the statute, in that case lately made and provided.

(f) Reg. Gen. (59) Mar. Ass. 2 W. 4.

(g) *Ade v. Stubbs*, 4 Dowl. P. C. 282.

BOOK 5. CHAP. XXV.

OF ISSUING EXECUTIONS FROM THE COURTS AT WESTMINSTER, UPON JUDGMENTS OF THIS COURT.

In the case of a party removing his person, or goods, out of the jurisdiction of this Court, in order to avoid execution, a remedy was provided by stat. 33 Geo. III., c. 68, s. 1, under the authority of which, any of the Courts of record at Westminster, is authorized, upon affidavit (a) of judgment being obtained, and diligent search and inquiry having been made, after the person against whom such judgment is obtained, and of execution having been issued, and that his person, or effects, cannot be found within the jurisdiction, to cause a transcript of the record of the judgment to be removed, to any of the Courts of record at Westminster, and to issue execution thereon, to the Sheriff of any county, or place; and such Sheriff is authorized by the act, to levy 40s. for the extraordinary costs. In proceeding under this act, the affidavit required by it, is filed in the Court from whence the execution is to issue; a *Certiorari* is obtained from such Court, the proceedings upon which are stated in a previous chapter (b): and when the transcript is sent to the Court above, an execution issues therefrom, of course.

Obtaining execution from the Courts at Westminster, under statute 33 Geo. 3, c. 68.

Although the above act is not repealed, yet a more simple, speedy, and less expensive remedy has been provided, by stat. 4 and 5 W. IV., c. 62, s. 31, which enacts, that "whenever a Plaintiff, or Defendant, in any action, or suit, in which judgment shall be recovered in this Court, shall remove his person, or goods, or chattels, from or out of the jurisdiction of this Court, it shall and may be lawful, for any of the superior Courts at Westminster, upon a certificate, from the Prothonotary of this Court,

Proceedings under statute 4 & 5 W. 4, c. 62.

(a) See form of affidavit Tidd's Prac. forms [6th Ed] 154.

(b) See ante pa. 249.

"or his deputy, of the amount of final judgment, obtained
 "in any such action, to issue a writ, or writs, of execution,
 "thereupon, for the amount of such judgment, and the
 "costs of such writ, or writs, and certificate, to the Sheriff
 "of any county, city, liberty, or place, against the *person*,
 "or persons, or *goods*, of the party, or parties, against
 "whom such final judgment shall have been obtained, in
 "such manner, as upon judgments obtained in any of the
 "said Courts at Westminster."

The Courts at Westminster are enabled by this act, to issue an execution, against the *person*, or *goods*, only; and not against *lands* (c): but a removal of the *person*, or *goods*, is sufficient, to entitle a party to execution. If, however, it appears, that the *goods* merely, are removed, the Court above will grant a *Fieri facias*, only; or if the *person* is removed, a *Capias ad satisfaciendum* (d).

Application,
 how made.

As the act authorizes any of the Courts at Westminster, to issue execution, it would seem that the application ought to be, by *motion*, to the Court; and it is questionable whether a Judge at chambers can interfere (e).

Affidavit in
 support of.

The Prothonotary grants, of course, upon application of the party, a verified certificate of the judgment (f): and

(c) See Doe (dem Stansfield) v. Shipley, 2 Dowl. P. C. 409.

(d) Lord v. Cross, 2 Ad. & El. 81. 3 Dowl. P. C. 4, S. C. 4 Nev. & M. 30, S. C.

(e) See ante pa. 316 and Lord v. Cross, *supra*; but an order was granted by Alderson B., at chambers, soon after the act passed. See Scholfield v. Banks, order filed with the Prothonotary, dated 17th September, 1834.

(f)

Certificate of Judgment.

In the Common Pleas at Lancaster.

Between A. B., Plaintiff,
 and

C. D. Defendant.

I, J. F., deputy Prothonotary of the said Court, do hereby certify, that final judgment was signed in this cause, on the _____ day of _____ in the year of our Lord _____ for £ _____ damages and costs [or, if in debt "for a debt of £ _____ and for £ _____ damages and costs.]
 Dated, &c.

J. F.

Affidavit of Signature.

T. C., of Preston, in the County of Lancaster, gentleman, maketh oath and saith, that he did see the above named J. F., set and subscribe his name, to the above written certificate.
 Sworn, &c.

T. C.

though the act mentions such certificate only, as requisite, to induce the Court above to issue an execution, yet it has been held, that the application must also be supported, by an affidavit, disclosing such facts, as show the case to be within the statute (g); a form of which affidavit is suggested below (h).

Leave is generally granted, in the first instance, for execution to issue: and the officer of the Court from which it issues, fixes the amount of the costs, as well of the execution, as of obtaining the certificate, which costs, the act authorises the Sheriff to levy. Issuing execution.

It is observable, that under the stat. 4 and 5 W. IV., c. 62, s. 31, a transcript of the record is not removed, from this Court, as under the stat. 33 Geo. III., c. 68 (i): and it would seem, that though an execution may be issued from the Court above, under the late act, yet the cause still remains in this Court, and that, if necessary, an execution may afterwards be issued therefrom.

(g) *Duckworth v. Fogg*, 4 Dowl., P. C. 396, and *Lord v. Cross*, *supra* note (d).

(h) *Affidavit to obtain an execution from one of the Courts at Westminster.*

In the King's Bench [or other Court from which it is proposed to issue the Execution].

In relation to a cause instituted in his Majesty's Court of Common Pleas for the County Palatine of Lancaster, wherein A. B. is the Plaintiff, and C. D., is the Defendant.

E. F., of in the County of Lancaster, gentleman, attorney for the said A. B., the Plaintiff in the above mentioned cause, maketh oath and saith, that the said A. B., recovered final judgment in the said cause, on the day of last, for the sum of £ which judgment is still in force, and the damages [or debt] and costs, are still unpaid, and unsatisfied. And this deponent further saith, that since the commencement of the said action, the said C. D., hath removed his person and goods, [or "his person" only; or "his goods" only, as the case may be] out of the jurisdiction of the said Court of Common Pleas at Lancaster, and hath no goods or chattels within the said jurisdiction: and that he this deponent is informed, and verily believes, that the said C. D. resides at [or "near"] in the County of out of the jurisdiction of the said Court of Common Pleas at Lancaster. E. F.

Sworn, &c.

[Before a Commissioner of the Court from which it is intended to issue the execution].

Note. See another form of affidavit, Chitty's forms, pa. 654.

(i) See ante pa. 343.

BOOK 5. CHAP. XXVI.

OF PROCEEDINGS IN COUNTIES PALATINE, IN ACTIONS
IN THE COURTS AT WESTMINSTER.Direction of
writs.

All writs issued from the Courts at Westminster, for execution in the County of Lancaster, are directed to the Chancellor of the County Palatine, except writs of *Habeas Corpus*, which are directed to the Sheriff, in the first instance,—writs of *Mittimus* (*a*), which are directed to the Justices,—and, (since the stat. 3 and 4 W. IV., c. 42), writs of trial. A reference to the forms of different Westminster writs, issuing into this County, is given below (*b*).

Bailable ac-
tions.

The writ of *Capias* (*c*), from a Court at Westminster, not being directed to the Sheriff of Lancashire, in the first instance, his authority to arrest in this County, upon such process, is not derived immediately from the Court above, but, by virtue of a *mandate* of the Chancellor of the County Palatine, to whom the process is directed. When the writ is directed to the Sheriff, in the first instance, it may be set aside for irregularity, at the instance of the Defendant (*d*). Where so directed, however, it was formerly held, that the Sheriff was bound to execute it (*e*); but whether so bound, since the uniformity of process act, is questionable.

Return of
writs.

When the Sheriff is ruled to return the Chancellor's mandate, he files his return, in the Court from which the writ on which the mandate is grounded issued: but when the return

(*a*) Evans' Pr. C. P. L. 145.

(*b*) For forms of the writs of *Capias* and *Distringas*, see the rules of the Courts at Westminster, of Mich. T. 3 W. 4. For other writs and proceedings, see Chitty's Forms, Index Tit. "Palatine Counties, &c." and Tidd's forms [6th Ed.] Index Tit. "County Palatine." See also Wentw. Index to Vol. 10.

(*c*) A defendant cannot be held to bail in a County Palatine, upon process of the Courts at Westminster, where the demand is under fifty pounds. See ante pa. 65, note (*a*).

(*d*) *Bracebridge v. Johnson*, 1 B. & B. 12. *Bradshaw & an. v. Davies*, 1 Chitt. rep. 374.

(*e*) *Jackson v. Hunter*, 6 T. R. 71.

is made voluntarily, at the request of the party, it is delivered to the Cursitor of this County, who thereupon makes the Chancellor's return, and delivers it to the attorney, or agent, to be filed (*f*); and when both the Sheriff and Chancellor are ruled, the one to return the mandate, and the other the writ, the Sheriff's return is delivered to the Cursitor, who makes out the Chancellor's return, and sends it to London.

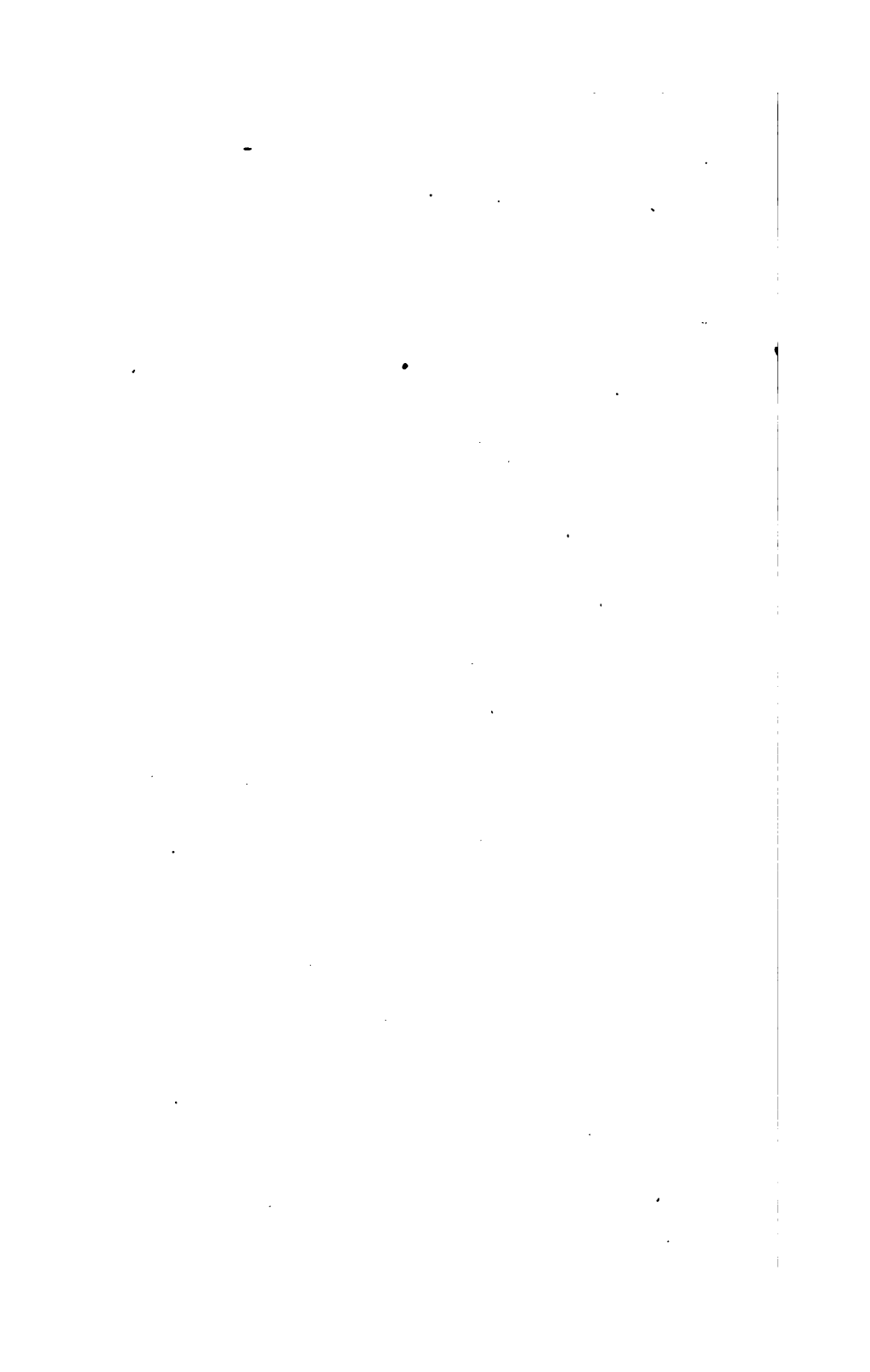
For the trial, in a County Palatine, of a cause depending in a Court at Westminster, instead of the common writ of *Venire facias*, there is a special writ of *Mittimus*, directed to the Justices of this Court, commanding them, to issue the jury process, and when the cause is tried, to send the record back to the Court above. The jury process issues from the Prothonotary's office; and is made out, tested, issued, and returnable, as the like process, in an action depending in this Court (*g*). The causes are entered for trial in the same lists as the causes of this Court, and are subject to the same regulations, as to the entry, and the order of trial (*i*). Trial of causes.

After the trial, the Prothonotary prepares the *postea*, Postea. and transmits it to his London agent, to be handed to the successful party. The *postea* is sent *forthwith*, if the Judge has certified for immediate execution; and in all other cases, at the beginning of the following term.

(*f*) Evans' Pr. C. P. L. 145-6.

(*g*) See ante pa. 160-1.

(*i*) See ante pa. 169 & seq.



T H E A C T

(4 & 5 W. 4, c. 62),

FOR

IMPROVING THE PRACTICE AND PROCEEDINGS

IN THE

Court of Common Pleas

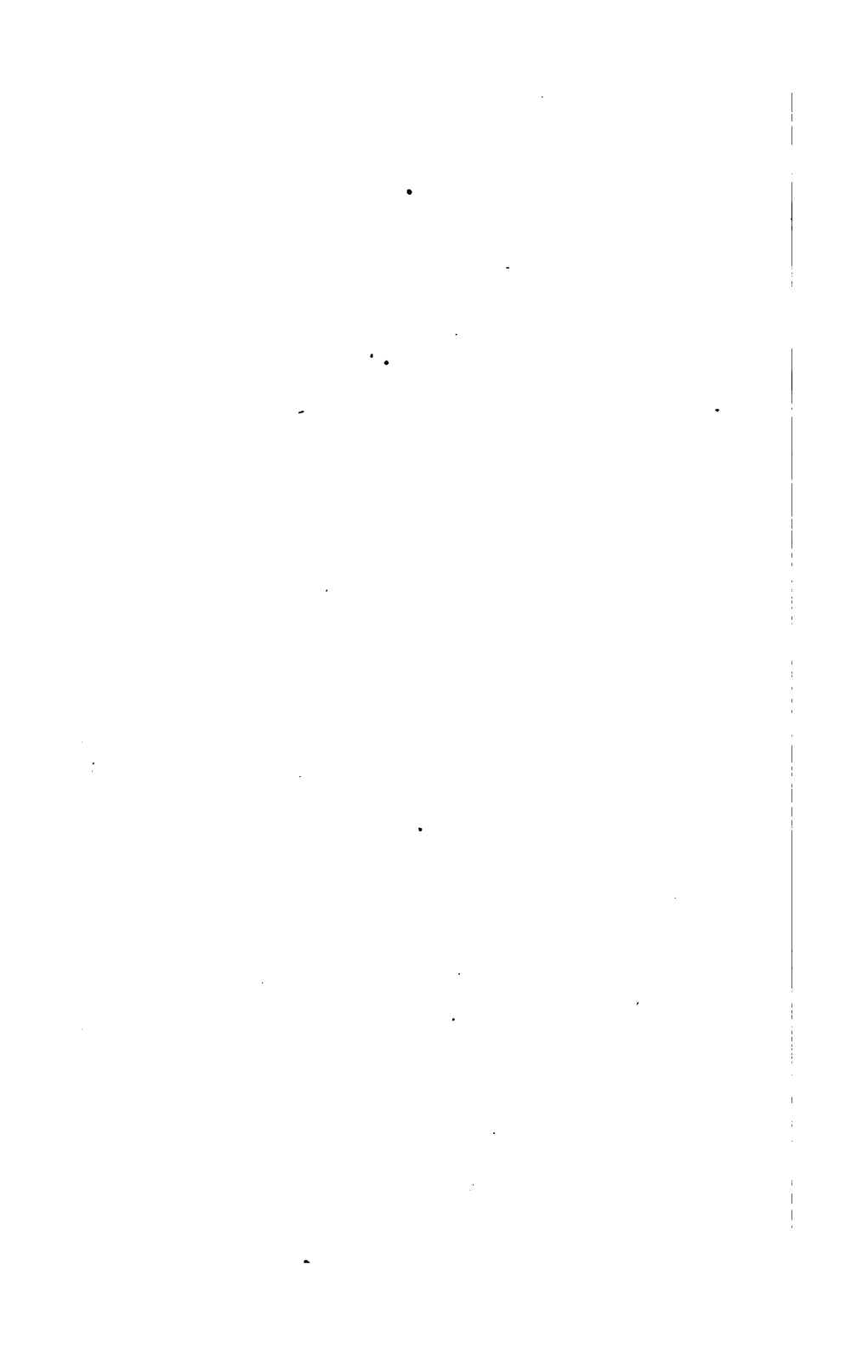
OF

THE COUNTY PALATINE OF LANCASTER;

AND THE

RULES OF COURT

FROM THE COMMENCEMENT OF THE REIGN OF W. IV.



STATUTE 4 AND 5 W. IV.. C. 62.

An Act for improving the Practice and Proceedings in the Court of Common Pleas of the County Palatine of Lancaster.—[13th August, 1834.]

“WHEREAS various alterations and improvements have recently been made, “by the authority of Parliament and otherwise, in the practice and proceedings in the superior Courts of Common Law at *Westminster*; and it is “expedient that certain alterations and improvements should be effected in “the practice and proceedings of the Court of Common Pleas at *Lancaster*”:

Be it therefore enacted, by the King’s most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the process in all personal actions hereafter to be commenced in the Court of Common Pleas at *Lancaster*, where it is not intended to hold the Defendant to special bail; shall, whether the action be brought by or against any person entitled to the privilege of Peerage or of Parliament, or of the said Court, or of any other Court, or to any other privilege, or by or against any other person, be according to the form contained in the schedule to this act annexed marked No. 1, (a) and shall be called a writ of Summons; and in every such writ, and copy thereof, the place and residence or supposed residence of the party Defendant, of wherein the Defendant shall be or shall be supposed to be, shall be mentioned; and such writ shall be issued by the Prothonotary of the said Court, or his deputy, and shall be served in the manner heretofore used in the County Palatine of *Lancaster*, and not elsewhere (b), and the person serving the same shall and is hereby required to indorse on the writ the day of the month and week of the service thereof.

(a) See form of the writ, ante pa. 53.

(b) See ante pa. 61.

Mode of appearance to serviceable process.

II.—And be it further enacted, that the mode of appearance to every such writ or under the authority of this act shall be by delivering to the said Prothonotary, or his deputy, a memorandum in writing, dated on the day of delivery thereof, according to the form contained in the said schedule and marked No. 2 (c).

Appearance may be enforced by a writ of *Distringas*, in case a defendant cannot be served with the writ of *Summons*.

III.—And be it further enacted, that in case it shall be made appear by affidavit to the satisfaction of the said Court, or one of the judges thereof, that any Defendant has not been personally served with any such writ of *Summons* as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then and in any such case, it shall be lawful for such court or judge, by rule or order, to order a writ of *Distringas* to be issued, directed to the Sheriff of the said County of *Lancaster*, (or to any other officer to be named in such rule or order), to compel the appearance of such Defendant, which writ of *Distringas* shall be in the form and with the notice subscribed thereto, mentioned in the schedule to this act marked No. 3.(d), which writ of *Distringas* and notice, or a copy thereof, shall be served on such Defendant, if he can be met with, or if not, shall be left at the place where such *Distringas* shall be executed; and a true copy of every such writ and notice shall be delivered together therewith to the Sheriff or other officer to whom such writ shall be directed, and every such writ shall be made returnable on a day certain, to be named therein, not being less than fifteen days after the teste thereof; and if such writ of *Distringas* shall be returned *Non est inventus* and *Nulla Bona*, and the party issuing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any Defendant against whom such writ of *Distringas* issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit, to the satisfaction of the said Court or one of the judges thereof, that due and proper means were taken and used to serve and execute such writ of *Distringas*, it shall be lawful for such Court or Judge to authorize the party suing out such writ to enter an appearance for such Defendant, and to proceed thereon to judgment and execution.

Bailable process for the commencement of personal actions.

IV.—And be it further enacted, that in all actions wherein it shall be intended to arrest and hold any person to special bail who may not be in custody of the keeper of the gaol of the said county, the process shall be by writ of *Capias*, according to the form contained in the said schedule

(c) See form of memorandum, ante pa. 81.

(d) See form of *Distringas*, ante pa. 82.

and marked No. 4 (e); and so many copies of such process, together with every memorandum or notice subscribed thereto, and all indorsements thereon as there may be persons intended to be arrested thereon or served therewith, shall be delivered therewith to the Sheriff or other officer or person to whom the same may be directed, or who may have the execution and return thereof, and who shall upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest, and shall indorse on such writ the true day of the execution thereof, whether by service or arrest; and if any Defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties, for his appearance thereto, the Plaintiff in such process may, after the detainer or arrest of such Defendant, declare against such Defendant, and proceed thereon according to the practice of the said Court, as against a Defendant in custody upon meane process: provided always, that it shall be lawful for the Plaintiff or his attorney to order the Sheriff or other officer or person to whom such writ shall be directed, to arrest one or more only of the Defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed by such Sheriff or other officer or person; and such service shall be of the same force and effect as the service of the writ of Summons hereinbefore mentioned, and no other.

V.—And be it further enacted, that upon the return of *Non est inventus* as to any Defendant against whom such writ of *Capias* shall have been issued, and also upon the return of *Non est inventus* and *Nulla bona* as to any Defendant against whom such writ of *Distringas* as hereinbefore mentioned shall have issued, whether such writ of *Capias* or *Distringas* shall have issued against such Defendant only, or against such Defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such Defendant by writs of *Exigent facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *Non est inventus* to a *Pluries* writ of *Capias ad respondendum* issued after an original writ: provided always, that every such writ of *Exigent*, *Proclamation*, and other writ subsequent to the writ of *Capias* or *Distringas*, shall be made returnable on a day certain in term; and every such first writ of *Exigent* and *Proclamation* shall bear teste on the day of the return of the writ of *Capias* or *Distringas*, and every subsequent writ of *Exigent* and *Proclamation* shall bear teste on the day of the return of the next preceding writ; and no such writ of *Capias* or *Distringas* shall be sufficient for the purpose of outlawry.

(e) See form of *Capias*, ante pa. 66-7.

or waiver if the same be returned within less than fifteen days after the delivery thereof to the Sheriff or other officer to whom the same shall be directed.

Proceedings to outlawry may be had after judgment given under the authority of this Act.

VI.—And be it further enacted, that after judgment given in any action commenced by writ of Summons or *Capias*, under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ: provided always, that every outlawry or waiver had under the authority of this act shall and may be vacated or set aside by writ of Error or Motion, in like manner as outlawry or waiver founded on an original writ may now be vacated or set aside.

Mode of detaining a prisoner in gaol.

VII.—And be it further enacted, that when it shall be intended to detain in any such action any person being in the custody of the Keeper of the gaol for the said county of *Lancaster*, the process of Detainer shall be according to the form of the writ of Detainer contained in the said schedule and marked number 5 (*f*), and a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the Keeper of the said gaol, who shall forthwith serve such copy upon the Defendant personally, or leave the same at his room, and the declaration thereupon shall and may allege the prisoner to be in custody in the said gaol; and the subsequent proceedings shall be as against prisoners in custody upon meane process, according to the practice of the said court, unless otherwise ordered by some rule to be made by the judges of the said court.

Duration of writs.

VIII.—And be it further enacted, that no writ issued as aforesaid by authority of this act, shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of Summons and *Capias* may be continued by *Alias* and *Pluries*, as the case may require, if any Defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited unless the Defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *Non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every

Proviso as to statute of limitations.

(*f*) See form of the writ, ante pa. 225.

writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ, and return to be made, in bailable process by the Sheriff or other officer to whom the writ shall be directed, or his successor in office, and, in process, not bailable, by the Plaintiff or his attorney suing out the same, as the case may be.

IX.—And be it further enacted, that when any writ of *Summons*, *Capias*, or *Detainer* issued by authority of this act, shall be served or executed, all necessary proceedings to judgment and execution may be had thereon, without delay, at the expiration of eight days from the service or execution thereof; provided always, that if the last of such eight days shall in any case happen to fall on a *Sunday*, *Christmas-day*, *Good Friday*, or any day appointed for a public fast or thanksgiving, in any of such cases the following day shall be considered as the last of such eight days.

Proceedings on writs served or executed at certain times.

Proviso for Sunday, &c.

X.—And be it further enacted, that upon every writ to be issued as aforesaid by authority of this act, the name or firm and the place of business or residence of the attorney or attorneys issuing such writ shall be indorsed thereon, and where such attorney or attorneys shall be agents only, then there shall be further indorsed thereon the name or firm and place of business or residence of the principal attorney or attorneys, but in case no attorney or attorneys shall be employed for that purpose, then a memorandum shall be indorsed thereon, expressing that the same has been sued out by the Plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such Plaintiff's residence, if any such there be.

Indorsement on writs of the name &c, of the attorney, or party suing.

XI.—And be it further enacted, that every such writ of *Summons* issued against a Corporation Aggregate may be served on the Mayor or other head officer, or on the Town Clerk, Clerk, Treasurer, or Secretary of such Corporation; and every such writ issued against the inhabitants of a Hundred or other like district may be served on the High Constable thereof, or any one of the High Constables thereof; and every such writ issued against the Inhabitants of the County of *Lancaster*, or the Inhabitants of any franchise, liberty, town, or place, not being part of a hundred or other like district, on some peace officer thereof.

Service of writs of *Summons* on Corporations, and on Inhabitants of hundreds and towns.

XII.—And be it further enacted, that all such proceedings as are mentioned in any writ, notice, or warning to be issued as aforesaid under this act, shall and may be had and taken in default of a Defendant's appearance or putting in special bail, as the case may be.

Proceedings in default of appearance.

Attorney to declare whether writ issued by his authority and name, &c., of his client, if ordered; if writ not issued by authority of the Attorney, Defendant may be discharged.

XIII.—And be it further enacted, that every attorney whose name shall be indorsed on any writ issued as aforesaid by authority of this act shall, on demand in writing made by or on behalf of any Defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity, and if he shall answer in the affirmative, then he shall also, in case the said court, or one of the judges thereof, shall by rule or order, so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode of the Plaintiff, on pain of being guilty of a contempt of the said court; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge thereof, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any Defendant or Defendants who may have been arrested on any such writ, on entering a common appearance.

Proviso for persons privileged from arrest.

XIV.—Provided always, and be it further enacted, that nothing in this act contained shall subject any person to arrest, outlawry, or waiver, who, by reason of any privilege, usage, or otherwise, may now by law be exempt therefrom, or shall extend to any cause removed into the said court by writ of *Pone loquelam*, *Accedas ad curiam*, *Certiorari*, *Recordari facias loquelam*, *Habeas corpus*, or otherwise.

As to writs for commencement of personal actions.

XV.—And be it further enacted, that from the time when this act shall commence and take effect the writs hereinbefore authorized shall be the only writs for the commencement of personal actions in the said court in the cases to which such writs are applicable.

Power to state a special case without proceeding to trial

XVI.—And be it further enacted, that it shall be lawful for the parties in any action depending or to be depending in the said Court of Common Pleas at *Lancaster*, after issue joined by consent, and by order of one of the judges of the same court, to state the facts of the case in the form of a special case for the opinion of the said court, or of one of the superior courts of common law at *Westminster*, and to agree that a judgment shall be entered for the Plaintiff or Defendant by confession or of *Nolle prosequi*, immediately after the decision of the case, or otherwise, as the court before which such case shall be heard may think fit, and judgment shall be entered accordingly.

Judges may make rules for altering and regulating the mode of pleading and transcribing records, and touching

XVII.—And be it further enacted, that it shall and may be lawful, for the Judges of the said Court of Common Pleas at *Lancaster* for the time being, or any two of them, from time to time to make such orders, rules, and regulations for altering and regulating the mode of pleading in that court, and for altering the mode of entering and transcribing pleadings,

judgments, and other proceedings in actions at law therein, and touching the voluntary admission, upon any application for that purpose, at a reasonable time before the trial of any action of one party to the other, of all such written or printed documents, or copies of documents, as are intended to be offered in evidence on the said trial by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause, in case of the omitting to apply for such admission, or the not producing of such documents or copies for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said judges of the said court for the time being, or any two of them, shall seem meet.

the admission
of Documents.

XVIII.—And be it further enacted, that all writs of Inquiry of Damages hereafter to be issued by the Court of Common Pleas at *Lancaster*, under and by virtue of the statute passed in the session of Parliament held in the eighth and ninth years of the reign of King *William the Third*, intituled *An Act for the better preventing frivolous and vexatious Suits*, shall, unless the said court, or one of the judges thereof, shall otherwise order, direct the Sheriff of the said county of *Lancaster* to summon a jury to appear before him, instead of the justices or justice of assize, of and for the said county, to inquire of the truth of the breaches suggested, and assess the damages that the Plaintiff shall have sustained thereby, and shall command the said Sheriff to make return thereof to the said court on a day certain in such writ to be mentioned, and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or Nisi Prius.

Writs of In-
quiry under the
statute 8 & 9W.
3, c. 11, to be
executed be-
fore the Sher-
riff, unless
otherwise or-
dered.

XIX.—And be it further enacted, that every other writ of Inquiry to be issued by the said Court of Common Pleas at *Lancaster*, shall be made returnable on any day certain to be named in such writ.

Return of other
writs of In-
quiry.

XX.—And be it further enacted, that in any action depending in the said Court of Common Pleas at *Lancaster*, for any debt or demand in which the sum sought to be recovered and indorsed on the writ of Summons shall not exceed twenty pounds, it shall be lawful for the said court, or any judge thereof, if such court or judge shall be satisfied that the trial of the said action will not involve any difficult question either of law or fact, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the Sheriff of the said county Palatine of *Lancaster*, or any judge of any Court of Record for the

Power to di-
rect issues
joined in cer-
tain actions to
be tried before
the Sheriff or
any Judge.

recovery of debt in such county, and for that purpose a writ shall issue, directed to such sheriff or judge, commanding him to try such issue or issues by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain to be named in such writ, and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues.

Upon the return of Inquiry or writ for Trial of issues judgment may be signed, unless, &c.

XXI.—And be it further enacted, that at the return of every writ of Inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the Sheriff or his deputy before whom such writ of Inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, shall certify under his hand, upon such writ, that judgment ought not to be signed until the Defendant shall have had an opportunity to apply to the said Court of Common Pleas at *Lancaster*, or one of the Judges thereof, for a new inquiry or trial, or the said court, or one of the judges thereof, shall think fit to order that judgment or execution shall be stayed till a day to be named in such order: and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at the assizes; and the Sheriff or his deputy or Judge presiding at the trial of such issue or issues shall have the like powers, with respect to the amendment on such trial, as are given to judges at Nisi Prius by an Act passed in the third and fourth years of the reign of His present Majesty, intituled *An Act for the further Amendment of the Law, and the better Advancement of Justice*.

3 & 4, W. 4,
c. 42.

Judgment may be vacated. execution stayed, and new trial granted.

XXII.—Provided always, and be it further enacted, that notwithstanding any judgment signed or execution issued as aforesaid by virtue of this act, it shall be lawful for the said Court of Common Pleas at *Lancaster* to order such judgment to be vacated and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of Inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby in such manner as upon the reversal of a judgment by writ of error or otherwise, as the court may think fit to direct

Defendant to be allowed to pay money into Court, in certain actions.

XXIII.—And be it further enacted, that it shall be lawful for the Defendant in all personal actions, except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the Plaintiff's daughter or servant, by leave of the said Court of Common Pleas at *Lancaster*, or one of the Judges thereof, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment

of costs, and the form of pleading, as the judges of the said court shall by any rules or orders by them to be from time to time made, order and direct.

XXIV.—“And whereas it would tend to further the administration of justice in the said Court of Common Pleas at *Lancaster*, if more of the judges of the superior Courts at *Westminster* were appointed justices for all manner of pleas within the said County Palatine of *Lancaster* ;” be it therefore enacted, that it shall and may be lawful to and for the King’s most excellent Majesty, in right of his Duchy and County Palatine of *Lancaster*, from time to time to nominate and appoint all or any of the Judges of the superior Courts at *Westminster* to be Judges of the Court of Common Pleas for the County Palatine of *Lancaster*: provided nevertheless, that the judges before whom the assizes for the said County Palatine of *Lancaster* shall from time to time be held, and their respective officers, shall alone be entitled to the fees and emoluments heretofore received by the judges of the said County Palatine and their officers.

XXV.—And be it further enacted, that the Judges of the superior Courts of Common Law at *Westminster*, or any eight or more of them, of whom the chief of each of the said courts shall be three, may, by any rule or order to be from time to time after this act shall take effect, make such regulations as to the fees to be charged by all and every or any of the officers of the said Court of Common Pleas at *Lancaster*, and the attorneys thereof, as to them may seem expedient, and to alter the same when and as it may seem fit and proper, so as such fees shall not exceed the fees now received, and all such regulations shall be binding and obligatory on the said Court of Common Pleas at *Lancaster* and all the officers and attorneys of the said court.

XXVI.—And be it further enacted, that it shall be lawful for any party in any action now depending or hereafter to be depending in the said Court of Common Pleas at *Lancaster*, to apply by motion to any one of the superior Courts at *Westminster* sitting in *Banco*, within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in the said superior court, for a rule to shew cause why a new trial should not be granted or nonsuit set aside and a new trial had or a verdict entered for the Plaintiff or Defendant, or a nonsuit entered, as the case may be, in such action, which court is hereby authorized and empowered to grant or refuse such rule, and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon as the same court shall think proper; and in case such court

shall order a new trial to be had in any such action, the party or parties obtaining such order shall deliver the same, or an office copy thereof, to the Prothonotary of the said Court of Common Pleas at *Lancaster*, or his deputy, and thereupon all proceedings upon the former verdict or nonsuit shall cease; and the action shall proceed to trial at the next or some other subsequent session of assizes holden for the county of *Lancaster*, in like manner as if no trial had been had therein; or in case the court before which any such rule shall be heard shall order the same to be discharged, the party or parties obtaining any such order, may, upon delivering the same or an office copy thereof to the said Prothonotary, or his deputy, be at liberty to proceed in any such action as if no such rule Nisi had been obtained; or if a verdict be ordered to be entered for the Plaintiff or Defendant, or a nonsuit be ordered to be entered, as the case may be, judgment shall be entered accordingly.

Judgment and Execution not to be stayed, unless the party moving enter into recognizance with sureties.

XXVII.—Provided always, and be it further enacted, that the entering up of judgment in any action in the said Court of Common Pleas at *Lancaster*, and the issuing of execution upon such judgment, shall not be stayed unless the party intending to apply for such rule as last aforesaid, shall, with two sufficient sureties, such as the last mentioned court shall approve of, become bound unto the party for whom such verdict or nonsuit shall have been given or obtained, by recognizance, to be acknowledged in the same court, in such reasonable sum as the same court shall think fit, to make and prosecute such application as aforesaid, and also to satisfy and pay, if such application shall be refused, the debt, or damages and costs adjudged and to be adjudged in consequence of the said verdict or nonsuit, and all costs and damages to be awarded for the delaying of execution thereon.

Not to take away power of granting new trial.

XXVIII.—Provided also, and be it further enacted, that nothing herein contained, shall prevent the said Court of Common Pleas at *Lancaster*, from granting any new trial, or setting aside any nonsuit, or entering a nonsuit, or altering a verdict as heretofore.

Service of subpoena on witnesses in any part of England and Wales, shall be valid to compel appearance.

XXIX.—And be it further enacted, that the service of every writ of *Subpoena* hereafter to be issued out of the said Court of Common Pleas at *Lancaster*, and served upon any person, in any part of *England* or *Wales*, shall be as valid and effectual in law, and shall entitle the party suing out the same to all and the like remedies, by action or otherwise howsoever, as if the same had been served within the jurisdiction of the said Court of Common Pleas at *Lancaster*; and in case such person so served shall not appear according to the exigency of such writ, it shall be lawful

for the same court, or one of the judges thereof, upon oath or affirmation to be taken in open court, or upon an affidavit, of the personal service of such writ, to transmit a certificate of such default, under the hand of one of the judges of the same court, to the Court of King's Bench in *England*; and the said last mentioned court shall and may thereupon proceed against and punish, by attachment or otherwise, according to the course and practice of the same court, the person so having made default, in such and the like manner as they might have done, if such person had neglected or refused to appear in obedience to a writ of *Subpœna* issued to compel the attendance of witnesses out of such last mentioned court.

XXX.—Provided always, and be it further enacted, that the said Court of King's Bench shall not, in any case, proceed against or punish any person, nor shall any such person be liable to any action, for having made default by not appearing to give evidence in obedience to any writ of *Subpœna* or other process, for that purpose issued under the authority of this act, unless it shall be made to appear to the court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of *Subpœna* was served upon such person.

XXXI.—And be it further enacted, that whenever a Plaintiff or Defendant in any action or suit in which judgment shall be recovered in the said Court of Common Pleas at *Lancaster*, shall remove his person or goods or chattels from or out of the jurisdiction of the said Court of Common Pleas at *Lancaster*, it shall and may be lawful for any of the superior Courts at *Westminster*, upon a certificate from the Prothonotary of the said Court of Common Pleas at *Lancaster*, or his deputy, of the amount of final judgment obtained in any such action, to issue a writ or writs of execution thereupon for the amount of such judgment, and the costs of such writ or writs and certificate, to the Sheriff of any county, city, liberty, or place, against the person or persons or goods of the party or parties against whom such final judgment shall have been obtained, in such manner as upon judgments obtained in any of the said Courts at *Westminster*.

XXXII.—And be it further enacted, that in case any rule of the said Court of Common Pleas at *Lancaster* cannot be enforced by reason of the non-residence of any party or parties within the jurisdiction thereof, it shall be lawful, upon a certificate of such rule by the Prothonotary of the said court, and an affidavit that by reason of such non-residence such rule

Expense of attendance on writs of *subpœna* shall be tendered to witnesses.

Where final judgment shall be obtained in the Court, and the person or effects cannot be found within its Jurisdiction, any of the superior Courts may issue execution &c.

If Rules of the court cannot be enforced, they may be made Rules of one of the superior courts.

cannot be enforced as aforesaid, to make such rule a rule of any one of the said Courts at *Westminster*, if such court shall think fit, whereupon such rule shall be enforced as a rule of such court.

Teste & date of writs & returns of Executions.

XXXIII.—And be it further enacted, that all writs issued out of the said Court of Common Pleas at *Lancaster* shall be tested in the name of the chief justice of that court, or in case of a vacancy of such office, in the name of one of the other judges thereof; and that every writ of *Venire facias juratores*, issued out of the same court, shall bear date on the day next preceding the first commission day of each assizes, unless such commission day shall be on a *Monday*, and then on the *Saturday* preceding; and that every writ of *Habeas corpora juratorum* shall bear date on the day of the return of the *Venire facias juratores*; and that all other writs, except writs of Exigent and Proclamation, shall respectively bear date on the day on which the same shall be issued; and that all writs of Execution may, if the party suing out the same shall think fit, be made returnable immediately after the execution thereof.

Power to adopt Rules to be made for the superior courts at Westminster.

XXXIV.—And be it further enacted, that whenever by any act of Parliament, or by or under the authority of any act of Parliament, or by any rule or order of any of His Majesty's superior Courts at *Westminster*, or of any of the judges of the same, any rules, orders, or regulations shall be made for the purpose of framing, regulating, or amending the proceedings, practice, or pleadings of any of the said superior Courts at *Westminster*, it shall be lawful for the Judges of the said Court of Common Pleas at *Lancaster*, or any two of them, by rule or order to be made in that behalf, to adopt, *mutatis mutandis*, all or any of such rules, orders, or regulations, or any part or parts thereof, as to the said last mentioned judges shall seem fit.

Costs of preparing pleadings.

XXXV.—And be it further enacted, that the costs to be from time to time allowed for preparing pleadings in actions in the said Court of Common Pleas at *Lancaster*, shall be the same as shall be allowed for preparing pleadings of a like description in actions in the superior Courts at *Westminster*.

Commencement of Act.

XXXVI.—And be it further enacted, that this act shall commence and take effect on the first day of *September*, one thousand eight hundred and thirty-four.

Act may be altered this

XXXVII.—And be it further enacted, that this act may be amended, altered, or repealed during the present session of Parliament.

RULES OF THE COURT OF COMMON PLEAS AT LANCASTER,

FROM THE BEGINNING OF THE PRESENT REIGN.

RULES OF AUGUST ASSIZES, 2 W. IV.

1.—It is ordered by the Court, that in all personal actions now depending, or hereafter to be depending in this court, the Plaintiff's attorney shall, on filing the declaration, in case the Defendant or Defendants shall have filed special bail or entered a common appearance, give notice of such declaration to the Defendant's attorney or agent; and, in case such declaration shall be filed *de bene esse*, or if an appearance shall be entered for such Defendant or Defendants according to the statute, shall give notice of such declaration to the Defendant or Defendants by delivering a notice of such declaration to the Defendant or Defendants, or leaving the same at the last or most usual place of his, her, or their abode; and every such notice shall contain the christian and surnames of all the parties to the suit, the nature of the action, and the time limited for such Defendant or Defendants to plead thereto; and in case the Defendant or Defendants shall be in gaol at the time of filing declaration, a copy thereof, together with such notice as aforesaid, shall be delivered to each Defendant, or to the gaoler or turnkey, as heretofore. Notice of declaration.

2.—And it is further ordered, that the time allowed to the Defendant or Defendants to plead to every such action, shall be eight days (exclusive): but that the Defendant or Defendants may obtain a rule for eight days further time to plead from the expiration of the first eight days, undertaking to go to trial at the following assizes; and in case such Defendant or Defendants (after such notice as aforesaid given) do not plead within the time first mentioned, or such enlarged time as aforesaid, the Plaintiff or Plaintiffs may sign judgment. Time for pleading.

3.—And it is further ordered, that all pleas in abatement and demurrers shall be filed before or immediately upon the expiration of such notice to plead as aforesaid, and if filed at any time afterwards, the Plaintiff may sign judgment as for want of plea. Pleas in abatement and demurrers, time for filing.

- Notice of Inquiry. 4.—And it is further ordered, that in future the notice of executing a writ of Inquiry of damages shall in *all cases* be four days (exclusive), such notice to be given in manner hereinbefore mentioned respecting notices of declaration.
- Appointment, to be peremptory. 5.—And it is further ordered, that from and after the present assizes, on every appointment to be made by the Prothonotary of this Court, or his deputy, the party on whom the same shall be served, shall attend such appointment, without waiting for a second, or in default thereof, the Prothonotary, or his deputy, shall be at liberty to proceed *ex parte* on the first appointment.
- Appearance or bail to causes removed. 6.—And it is further ordered, that every appearance or bail to any writ of *Certiorari*, *Pone loquellam*, *Recordari facias loquellam*, or *Accedas ad curiam*, to be issued after the first day of the present assizes, shall be entered or filed respectively, within eight days next after the day on which such writs shall be made returnable, or in default thereof that a writ of *Procedendo* may issue, to remand the cause.
- Error to this Court, proceeding in. 7.—And it is further ordered, that the Plaintiff or Plaintiffs in every writ of Error hereafter to be issued and returnable into this court, shall, within eight days (exclusive) after the return thereof, file such writ, and assign the errors formally in writing, and give notice thereof, to the Defendant or Defendants, his or their attorney, or agent; and upon the filing of every assignment of errors, the Plaintiff or Plaintiffs may issue a writ of *Scire facias ad audiendum errores*, returnable on the next monthly return, and proceed in the suit according to the present practice of this Court.
- False judgment, proceeding in. 8.—And it is further ordered, that the Plaintiff or Plaintiffs in every writ of false judgment hereafter to be issued, shall, within eight days (exclusive) after the return thereof, file such writ, and assign the errors formally in writing, and give notice thereof to the Defendant or Defendants, his or their attorney, or agent, or in default thereof a writ of Execution of judgment may issue, to remand the cause.
- Particulars of demand to be delivered with notice of declaration. 9.—And it is further ordered, that when a declaration shall contain counts in *indebitatus assumpsit*, or debt on simple contract, the Plaintiff shall deliver with the notice thereof, full particulars of his demand under those counts, when such particulars can be comprised within three folios; but if the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that num-

ber of folios. And, to secure the delivery of particulars in all such cases, it is further ordered, that if any notice of declaration shall be delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the Plaintiff shall not be allowed any costs in respect of any rule, summons, or order, obtained for the delivery of such particulars, or of the particulars he may afterwards deliver.

10.—And it is further ordered, that there shall be subjoined or annexed Notice of Set-off. to every notice of set-off (a), (and which notice shall be in the form annexed, with such alterations as circumstances may require) a full particular of such set-off, if the same can be comprised within three folios; but if the same cannot be comprised within three folios, the Defendant or Defendants shall deliver such a statement of the nature of his set-off as may be comprised within that number of folios.

11.—And it is further ordered, that when any Defendant or Defendants Particulars of Set-off to be delivered with notice of plea. shall plead a set-off, he or they shall, with the notice of such plea, deliver a full particular of such set-off, when the particulars can be comprised within three folios; but if the same cannot be comprised within three folios, the Defendant or Defendants shall deliver such a statement of his or their set-off as may be comprised within that number of folios. And, in order to secure the delivery of the particulars of set-off, it is ordered by the Court, that if any notice of plea of set-off, or notice of set-off shall be given without such particulars or statement as aforesaid, the Defendant shall be precluded from giving any evidence of his set-off.

12.—And it is further ordered, that a copy of the particulars of demand, Annexing particulars to record. and also of the particulars (if any) of the Defendant's set-off, shall be annexed by the Plaintiff's attorney to every record at the time the cause is entered for trial.

13.—Whereas declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties, by reason of their length, and the same may be drawn in a more concise form. Now, for the prevention of such expense, it is ordered by the Court, that if any declaration in assumpsit, to be filed after the first day of October next, being for any of the demands mentioned in the schedule of forms and directions annexed to this order(b), Forms of declarations.

(a) As Set-off is now *pleaded*, notice thereof is not given, and this rule has consequently become inoperative.

(b) These forms being precisely similar to those prescribed for the Courts at Westminster, it is deemed unnecessary to give them here.

or demands of a like nature, shall exceed in length, such of the said forms, set forth or directed in the said schedule, as may be applicable to the case; or if any declaration in debt, to be so filed or delivered for similar causes of action, and for which the action of assumpsit would lie, shall exceed such length, no costs of the excess shall be allowed to the Plaintiff, if he succeeds in the cause, and such costs of the excess as have been incurred by the Defendant shall be taxed and allowed to the Defendant, and be deducted from the costs allowed to the Plaintiff. And it is further ordered, that on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length, and in case any costs shall be payable by the Plaintiff to the Defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

RULES OF MARCH ASSIZES, 2 W. IV.

Warrant to prosecute or defend, entry of on the roll. 1.—It is ordered by the Court, that warrants of attorney to prosecute or defend shall not be entered on distinct rolls, but on the top of the issue roll (c).

Admission of prochein amy. 2.—And it is further ordered, that a special admission of Prochein amy, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

Addition of deponent to be stated in affidavit. 3.—And it is further ordered, that the addition of every person making an affidavit shall be inserted therein.

Affidavits not to be sworn before attorney 4.—And it is further ordered, that no affidavit shall be received or filed if it be sworn before the Plaintiff's attorney, whether he be or be not the attorney on record; and that an affidavit sworn before an attorney's clerk shall not be received, in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

Second arrest. 5.—And it is further ordered, that after nonpros, nonsuit, or discontinuance, the Defendant shall not be arrested a second time, without the order of one of the judges of this court.

(c) By rule 4, of the Courts at Westminster of Hil. T. 4 W. 1 V., (which rules are applicable to all Courts of Common law), it is ordered that "no entry shall be made on record of any warrants of attorney to sue or defend."

6.—And it is further ordered, that affidavits to hold to bail, for money paid to the use of the Defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the Defendant.

Affidavits to hold to bail in certain cases.

7.—And it is further ordered, that when bail to the Sheriff become bail to the action, the Plaintiff may except to them, though he has taken an assignment of the bail bond.

Bail, exception to after assignment of bail bond.

8.—And it is further ordered, that to all bailable writs of *Capias ad respondendum* hereafter to be issued and made returnable at an assizes, the Defendant or Defendants shall file special bail within eight days next after the return thereof, otherwise the Plaintiff may be at liberty to proceed against the Sheriff, or on the bail bond, according to the practice of the court (*d*)

Bail, when to be filed, on writs returnable at the assizes.

9.—And it is further ordered, that notice of more bail than two shall be deemed irregular, unless by order of this court or one of the judges thereof.

Notice of bail.

10.—And it is further ordered, that affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth the amount required by the practice of the court, over and above what will pay his just debts, and over and above every other sum for which he is then bail (*e*).

Affidavit of justification, what to state.

11.—And it is further ordered, that bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

Rejected bail may render the principal.

12.—And it is further ordered, that the recognizance of bail shall in all cases be taken in double the sum sworn to by the affidavit of debt, except where the sum amounts to £1000. or upwards, and then in £1000. beyond the sum sworn to.

Recognizance of bail, amount of.

13.—And it is further ordered, that bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance.

Bail, extent of liability.

14.—And it is further ordered, that a Plaintiff shall not be at liberty to proceed on the bail bond pending a rule to bring in the body of the Defendant.

Bail bond, proceeding on.

(*d*) This rule is rendered nugatory by the alteration of the form of process, in pursuance of 4 & 5 W. IV., c. 62.

(*e*) See further as to the affidavit of Justification, rule 9 of Mar. Ass. 5 W. 4.

Recognizance of bail in error, amount of. 15.—And it is further ordered, that a recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty, and in case of a penalty in double the sum really due, and double the costs.

Like, in Ejectment. 16.—And it is further ordered, that in ejectment, the recognizance of bail in error shall be taken in double the yearly value and double the costs.

Bail bond standing as security. 17.—And it is further ordered, that in all cases where the bail bond shall be directed to stand as a security, the Plaintiff shall be at liberty to sign judgment upon it, and that if the Plaintiff succeeds in the original action, he shall be allowed the costs of proceeding upon the bail bond as part of the costs of the cause, but without prejudice to his right to recover the same, if necessary, under the judgment upon the bail bond.

Bail bond, staying proceedings on. 18.—And it is further ordered, that proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more.

Describing defendant by initials &c. 19.—And it is further ordered, that where the Defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a christian name, the Defendant shall not be discharged out of custody, or the bail bond delivered up to be cancelled, if on a summons, or a rule to shew cause for that purpose, it shall appear to the court, or to the judge before whom cause is shewn, that due diligence has been used to obtain knowledge of the proper name.

Irregularity, when to apply to set aside proceedings for. 20.—And it is further ordered, that no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

Plaintiff out of court, when. 21.—And it is further ordered, that a Plaintiff shall be deemed out of court, unless he declare within one year after the process is returnable.

Waiving plea. 22.—And it is further ordered, that the Defendant shall not be at liberty to waive his plea without leave of the court, or one of the judges thereof.

Particulars of demand, when and how applied for. 23.—And it is further ordered, that a rule for particulars and order thereon may be obtained by a Defendant before appearance, and may be made, if the judge think fit, without the production of any affidavit.

Notice of declaration, affixing in prothonotary's office. 24.—And it is further ordered, that where the residence or last place of abode of a Defendant is unknown to the Plaintiff and his attorney, notice

of declaration may be stuck up in the Prothonotary's office, but not without previous leave of the court, or one of the judges thereof.

25.—And it is further ordered, that service of rules, and orders, and Rules &c., time notices, if made before nine at night, shall be deemed good; but not if made after that hour. for service of.

26.—And it is further ordered, that it shall not be necessary to the regular service of a rule, that the original rule shall be shewn, unless sight thereof be demanded, except in cases where a party may be attached for not obeying such rule. Rules, how served.

27.—And it is further ordered, that on payment of money into Court the Defendant shall undertake by the rule to pay the costs, and in case of non-payment within two days, exclusive, after the taxation, to suffer the Plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages (*f*). Paying money into court.

28.—And it is further ordered, that if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second. New trial, costs of former trial, when not allowed.

29.—And it is further ordered, that a rule nisi for judgment as in case of nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings. Judgment as in case of nonsuit, how obtained.

30.—And it is further ordered, that no motion for judgment as in case of nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, (*i. e.*) without moving at all for judgment as in case of nonsuit, or after such motion is disposed of: or the Court on discharging a rule for judgment as in case of nonsuit, may order the Plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule. Motion for, when not allowed. Costs of the day.

31.—And it is further ordered, that no warrant of attorney to confess judgment, or *Cognovit actionem*, given by any person in custody of the Sheriff or his officer, upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of Warrant of attorney or cognovit given by a Prisoner.

(*f*) The practice of paying money into Court has been altered since this rule was made, see ante pa. 259.

the nature and effect of such warrant or cognovit, before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the Defendant, and state that he subscribes as such attorney.

Costs of counts or issues, when deducted, or disallowed.

32.—And it is further ordered, that no costs shall be allowed on taxation, to a Plaintiff, upon any counts or issues upon which he has not succeeded, and the costs of all issues found for the Defendant shall be deducted from the Plaintiff's costs.

Attorney's lien not to be prejudiced by Set-off of damages or costs.

33.—And it is further ordered, that no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided nevertheless that interlocutory costs, in the same suit, awarded to the adverse party, may be deducted.

Security for costs, when to be applied for.

34.—And it is further ordered, that an application to compel the Plaintiff to give security for costs, must, in ordinary cases, be made before issue joined.

Penal actions, compounding.

35.—And it is further ordered, that leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall have been given to the proper officer; but in other cases it may.

Court rolls, inspection of.

36.—And it is further ordered, that an order upon the Lord of the Manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection.

Paying money into Court, in several consolidated actions

37.—And it is further ordered, that where money is paid into court in several actions which are consolidated, and the Plaintiff without taxing costs proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court.

Rule to discontinue after plea

38.—And it is further ordered, that every rule to discontinue an action after plea pleaded, shall contain an undertaking on the part of the Plaintiff to pay the costs, and a consent, that if they are not paid within four days after taxation, the Defendant shall be at liberty to sign judgment of non-pros.

Pleadings when signed not by

39.—And it is further ordered, that when any pleadings conclude to the country, it shall not be necessary to have them signed by counsel.

40.—And it is further ordered, that where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a rule to *shew cause* why he should not pay costs, though he has not been dispaupered.

Pauper's liability to costs of the day.

41.—And it is further ordered, that a writ of Error shall be deemed a *Supersedeas*, from the time of the allowance.

Writ of Error, when deemed a *Supersedeas*.

42.—And it is further ordered, that to entitle bail to a stay of proceedings pending a writ of Error, the application must be made before the time to surrender is out.

Bail, staying proceedings, pending error.

43.—And it is further ordered, that upon every bailable process and warrant, and upon the copy of every process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the Plaintiff's attorney claims for the costs of such process, arrest, or copy and service, mileage and attendance to receive debt and costs, and that upon payment thereof within four days after the arrest or service, to the Plaintiff or his attorney, further proceedings will be stayed.

Indorsement of debt and costs on process.

The Indorsement shall be written or printed in the following form :—

The Plaintiff claims £ for debt and £ (g) for writ, arrest, and attendance to receive debt and costs [or £ (g) for writ, copy and service, and attendance to receive debt and costs,] together with £ for Chancellor's fine (h), and mileage or agency, (if any) being in the whole £ for costs. And if the above amounts of debt and costs be paid to the Plaintiff or his attorney, within four days from the arrest, or service hereof, further proceedings will be stayed.

44.—And it is further ordered, that a copy of the warrant and notice shall be given to the Defendant, at the time of the arrest.

Copy, warrant, &c., to be delivered on arrest.

45. } These rules fix the amount of costs to be allowed for process—bail-
46 } able and serviceable—but this has been altered by a subsequent rule
(i).

47.—And it is further ordered, that notwithstanding a Defendant may have paid the amount of costs claimed by the Plaintiff's attorney, in pursuance of the two last rules, he may at any time, within a month afterwards, obtain a rule from the Prothonotary of this Court or his deputy, calling

Taxing costs of process.

(g) The sum to be indorsed, is regulated by rule 2 of Mar. Ass. 5 W. IV., see post.

(h) The Chancellor's fine is now abolished.

(i) See rule 2 of Mar. Assizes, 5 W. IV., and see ante pa. 324.

upon the Plaintiff's attorney to deliver to the Defendant a signed bill of his costs, which the Defendant may afterwards have taxed on depositing with the said Prothonotary or his deputy, the sum of seven shillings; and if one-sixth be deducted from the amount charged for [Chancellor's fine (j),] mileage or agency, the Plaintiff's attorney shall pay the costs of the application; but if less than one-sixth shall be disallowed, the costs of the application shall be in the discretion of the said Prothonotary, or his deputy.

The like.

48.—And it is further ordered, that if any overcharge be made by the Plaintiff's attorney, in the amount charged for writ, arrest, or service and copy, and attendance to receive debt and costs, the Plaintiff's attorney shall pay the costs of the application.

Sheriff's officer making overcharge.

49.—And it is further ordered, that if any Sheriff's officer shall, under any pretence whatever, take from a Defendant on the execution of any bailable process, a larger sum than is allowed by this Court, the Sheriff shall, by an order of this Court, or one of the judges thereof, be compelled to refund to the Defendant the amount of any such overcharge, together with the costs of any application that may be made for that purpose, provided such application be made during the time such Sheriff remains in office, or within a month afterwards.

Bail Bond, or Attachment against the Sheriff, when to stand as security.

50.—And it is further ordered, that upon staying proceedings either upon an attachment against the Sheriff for not bringing in the body, or upon the bail bond, on perfecting bail, the attachment or bail bond shall stand as a security, if the Plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, at the assizes next after the return of the writ.

Expense of witnesses proving documents, when not allowed.

51. And it is further ordered, that the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him, shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission (k).

The like.

52.—And it is further ordered, that the expense of a witness called only to prove the hand-writing to, or the execution of, any written instrument

(j) See note (h) on last page.

(k) This rule has been altered by rule 4 of March assizes, 4 W. IV. see post.

stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before one of the judges of this Court, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such hand-writing or execution, or unless the judge upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission (l).

53.—And it is further ordered, that in all actions of ejectment by landlord against tenant, hereafter to be commenced in this Court by *declaration*, between the August and March assizes, if the declaration be filed, and a copy thereof, with the usual notice, served, upon the tenant or tenants in possession of the lands or premises in question, on or before the third day of February, the Defendant or Defendants shall, at the following rule day, enter his or their appearance (m). Ejectment by landlord against tenant, when declaration may be filed.

54.—And it is further ordered, that in all actions of ejectment by *declaration*, if the tenant or tenants, or such other person or persons as shall by this Court be suffered or permitted to be made Defendant or Defendants, (in the room or stead of the casual ejector), either with or without such tenant or tenants, do not appear at the rule day next after such service, and enter into the usual and common consent rule, judgment by default may be immediately entered by order of one of the judges of this Court, to be made upon the usual affidavit of service (m) Ejectment by declaration, time for appearing.

55.—And it is further ordered, that in all actions of ejectment hereafter to be commenced by writ of *Pone*, if the tenant or tenants in possession of the premises in question, or such other person or persons as shall by this court be suffered or permitted to be made Defendant or Defendants (in the room or stead of the casual ejector) either with or without such tenant or tenants, do not appear within eight days exclusive next after the return of the writ, and enter into the usual and common consent rule, judgment by default may be immediately entered by order of one of the judges of this Court, to be made upon the usual affidavit of service. Ejectment by *Pone*, time for appearing.

56.—And it is further ordered, that the time for pleading in every action of ejectment hereafter to be commenced in this Court shall be *three* (n) days exclusive; and in case the Defendant or Defendants do not plead within such time, the Plaintiff may sign judgment. Ejectment, time for pleading.

(l) See the last note.

(m) The 12 & 13 rules of March Assizes 5 W. IV. have virtually repealed the above.

(n) The time for pleading in Ejectment is now *eight* days, exclusive, see rule 12 of March Assizes 5 W. 4.

Rule to tax costs, as between attorney and client, when granted by Prothonotary.

57.—And it is further ordered, that the Prothonotary of this Court or his deputy, shall have power to grant a rule absolute in the first instance, to tax any bill of cost delivered by an attorney to his client, upon the usual undertaking, provided an application be made for such rule, within twenty-eight days after the delivery of the bill.

Scire facias to revive a judgment, proceeding on.

58.—And it is further ordered, that in future it shall not be necessary to sue out more than one writ of *Scire facias* for the purpose of reviving any judgment, but that such writ shall be personally served; and in case an appearance be not entered at the return thereof, or within eight days next after, the Plaintiff may, upon an affidavit of service of the writ, and of the amount due, be at liberty to sign judgment and issue an execution (o).

Scire facias, quashing.

59.—And it is further ordered, that a Plaintiff shall not be allowed to quash his own writ of *Scire facias*, after a Defendant has appeared, except on payment of costs.

Allowance for attorney's attendance in certain cases.

60.—And it is further ordered, that in all actions of assumpsit, or debt on simple contract, hereafter to be entered for trial in this Court (*whether such action be depending in this Court or be so entered by virtue of a writ of *Mittimus* from any other court*), when the debt or damages recovered shall not exceed £20 the Plaintiff's attorney, on the taxation of costs between party and party, shall not be allowed more than four guineas for his attendance to conduct the trial; nor shall any more be allowed him for such attendance as between attorney and client, unless he attend at the express request, in writing, of his client.

The like.

61.—And it is further ordered, that no more than four guineas shall be allowed to an attorney, for attending to conduct the trial of an *undefended* cause, whatever the amount of damages recovered may be, if the Defendant's attorney shall two days (exclusive) previous to the first day of the assizes give notice to the Plaintiff's attorney, or to his agent, of his intention not to defend.

Affidavit on issuing execution after judgment by default, in debt on simple contract.

62.—And it is further ordered, that after judgment by default in an action of debt on simple contract, the Plaintiff shall, on issuing execution, cause to be filed with the Prothonotary of this Court or his deputy, an affidavit of the amount due at the time of making such affidavit, which amount shall be indorsed upon the writ of Execution, and which affidavit shall be sworn within a week from the issuing of such execution.

(o) This rule has been altered by rule 20 of March Assizes 5 W. 4, see post.

63.—And it is further ordered, that in all actions of debt on simple contract, and assumpsit, after judgment by default, the Prothonotary of this Court, or his deputy, shall, on the taxation of costs, allow only for such part of the declaration as he shall think necessary.

Costs of declaration after judgment by default, in certain cases.

64.—And it is further ordered, that a rule of this Court made at the Lent assizes, 1 Geo. II. as to entering appearances for Defendants, on writs returnable at an assizes, and giving notice of inquiry, be rescinded.

General rule of Lent assizes. 1 Geo. 2, repealed.

65.—And it is further ordered, that in all cases in which any particular number of days not expressed to be clear days, is prescribed by the rules or practice of this Court, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

Computation of time.

66.—And it is further ordered, that these rules shall take effect on the first day of May next.

RULES OF MARCH ASSIZES, 4 W. IV.

1.—It is ordered by the Court, that in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be filed, without such statement, or with a frivolous statement, it may be set aside as irregular, by the Court, or a judge, and leave may be given to sign judgment as for want of a plea; provided that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court, or one of the judges thereof, in the usual way.

Statement in the margin of demurrer of matter of law to be argued.

2.—And it is also ordered by the Court, that to a joinder in demurrer, no signature of counsel shall be necessary, nor any fee allowed in respect thereof.

Joinder in demurrer, not to be signed by Counsel.

3.—And it is also ordered by the Court, that where a Defendant shall plead a plea of judgment recovered in another court, he shall, in the margin of such plea, state the date of such judgment, and if such judgment shall be in a Court of Record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the Plaintiff shall be

Plea of judgment recovered, Statement in the margin of.

at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the Defendant, the Plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the Court, where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment, as for want of a plea, by leave of the Court, or one of the judges thereof.

Admission of documents.

4.—And it is also ordered by the Court, that either party after plea pleaded and a reasonable time before trial, may give notice to the other party or his agent, in the form hereto annexed (a), or to the like effect, of his intention to adduce in evidence, certain written or printed documents, and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a judge, why he should not consent to such admission; or in case of refusal, be subject to pay the costs of proof: and unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document, specified in the notice, which shall be proved at the trial to the satisfaction of the judge, or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause. Provided, that if the judge shall think the application unreasonable, he shall indorse the summons accordingly. Provided also, that the judge may give such time for inquiry or examination of the documents, intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit. If the party required shall consent to the admission, the judge shall order the same to be made. No costs of proving any written or printed document shall be allowed to any party, who shall have adduced the same in evidence, on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons, that he does not think it reasonable to require it. A judge may make such order as he may think fit, respecting the costs of the application, and the costs of the production and inspection, and in the absence of a special order, the same shall be costs in the cause.

(a) See form of notice ante pa 152-3.

5.—And it is also ordered by the Court, that notwithstanding the rule made at September assizes, 2 Geo. IV., writs of execution may be issued at any time during the assizes, in actions depending in this Court, and entered for trial, if the judge before whom such actions may be tried shall so direct.

Issuing executions during the Assizes.

RULES OF MARCH ASSIZES, 5 W. IV.

1.—It is ordered by the Court, that all the rules of this Court, in force at the time of passing the Act 4 & 5 W. IV., c. 62, respecting the proceedings in actions commenced by writs of *Capias ad respondendum*, and not hereby altered, shall be applicable to proceedings in actions hereafter to be commenced by writs of *Summons*, *Capias*, and *Detainer*, and that in all such last-mentioned actions, the Prothonotary of this Court, or his deputy, shall have power to issue all such rules, as he was at the time of passing the said act, empowered to issue, in actions commenced by writs of *Capias ad respondendum*, or rules to the like effect, *mutatis mutandis*.

Extension of general rules to proceedings under 4 & 5, W. 4, c. 62.

2.—And it is further ordered, that the rule of March assizes, 2 W. IV. requiring the amount of debt and costs to be indorsed upon process, shall be applicable to writs of *Summons*, *Capias*, and *Detainer*, issued under the authority of the said act, and to the copy of each such writ; but the sum to be indorsed for costs of each such writ shall be as under (a), exclusive of mileage or agency.

Debt and costs to be indorsed on process.

3.—And it is further ordered, that if the Plaintiff or his attorney, shall omit to insert in, or indorse on any writ or copy thereof, any of the matters required by the said act, to be by him inserted therein, or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular, upon application to be made to this Court, or one of the judges thereof.

Effect of omission to insert in the writ, or to indorse thereon the matters required.

4.—And it is further ordered, that if any attorney shall, as required by the said act, declare that any writ of *Summons*, or writ of *Capias*, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings on the same shall be stayed, until further order.

Staying proceedings when writ issued without Attorney's authority.

(b) See the costs as fixed by this rule ante pa. 324.

Joining several defendants in one writ.

5.—And it is further ordered, that every writ of Summons, *Capias*, and Detainer, shall contain the names of all the Defendants, if more than one in the action, and shall not contain the name or names of any Defendant or Defendants in more actions than one.

Indorsing service on writ of Summons.

6.—And it is further ordered, that the person serving a writ of Summons shall, within three days after such service, indorse on such writ, the day of the week and month of such service, otherwise the Plaintiff shall not be at liberty to enter an appearance for the Defendant, according to the statute; and every affidavit upon which such an appearance shall be entered, shall mention the day on which such indorsement was made.

Indorsing execution on writ of *Capias*.

7.—And it is further ordered, that the Sheriff or other officer or person to whom any writ of *Capias* shall be directed, or who shall have the execution and return thereof, shall within six days after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof; and in default thereof, shall be liable in a summary way, to make such compensation for any damage which may result from his neglect, as this Court or one of the judges thereof shall direct.

Declaring *de bene esse*.

8.—And it is further ordered, that upon all writs of *Capias*, where the Defendant shall not be in actual custody, the Plaintiff at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse* in case special bail shall not have been perfected; and if there shall be several Defendants and one or more of them shall have been served only, and not arrested, and the Defendant or Defendants so served, shall not have entered a common appearance, the Plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief, and *de bene esse* against the Defendant or Defendants who shall have been arrested, and shall not have perfected special bail.

Accompanying notice of bail with special affidavit of justification.

9.—And it is further ordered, that if a notice of special bail shall be accompanied by an affidavit of each of the bail, according to the form hereto subjoined (*b*), and if the Plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the Defendant shall pay the costs of opposition, unless this Court or a judge thereof shall otherwise order.

(c) See form ante pa. 89-90.

10.—And it is further ordered, that in every action on a recognizance of bail, to be commenced by writ of Summons, such writ shall be indorsed with a memorandum stating that the same is on a recognizance of bail, in a suit against C. D. the Defendant, or the Defendant first named in the process in the original action, and another or others (in case there are more than one) and proceedings thereon may be stayed on payment of costs of the writ and service thereof, and affidavit of such service, if made, in case the Defendant or Defendants in the original action for whom such bail shall have been given, shall be surrendered, and notice thereof shall be given within eight days inclusive of, and next after the service or execution of such writ against the bail.

Proceedings on recognizance of bail.

11.—And it is further ordered, that upon affidavit of the service of such writ and of such surrender having been made, and notice thereof given, as in the last rule is mentioned, the said Prothonotary or his deputy, shall have power to issue a rule absolute to stay proceedings on the recognizance of bail, upon payment of such costs as aforesaid.

Staying proceedings on recognizance of bail.

12.—And it is further ordered, that declarations in Ejectment may be filed at any time, without reference to terms or rule days; and that the time for pleading in every action of ejectment, shall be eight days exclusive: and that every such action shall stand for trial at the assizes next after issue joined, in case such issue be joined eight days (exclusive) previous to such assizes, unless this Court or one of the judges thereof shall otherwise order.

Ejectment, proceeding in.

13.—And it is further ordered, that in all actions of Ejectment hereafter to be commenced by declaration, if the tenant or tenants, or such other person or persons, as shall, by this Court, be suffered or permitted to be made Defendant or Defendants in the room or stead of the casual ejector, either with or without such tenant or tenants, do not appear within fourteen days next after service of the declaration upon the tenant or tenants in possession of the lands or premises in question, and enter into the usual and common consent rule, judgment by default may be immediately entered, by order of one of the judges of this Court, to be made upon the usual affidavit of service.

Ejectment, judgment against casual Ejector.

14.—And it is further ordered, that whenever an issue in fact, in any personal action, shall be joined eight days (exclusive) before an assizes, the cause shall stand for trial at such assizes; and if the cause be not tried at such assizes, the Plaintiff, or the Defendant if he brings it on by proviso, shall give eight days (exclusive) notice of trial, previous to any subsequent

Joining issues for the assizes.

Notice of trial, assizes. Provided always, that where a term's notice of trial is necessary, by the practice of the Court of Common Pleas at *Westminster*, a full four weeks' notice of trial shall be given in this Court.

Rule to plead several matters &c.

15.—And it is further ordered, that in future, rules to plead several matters, or to make several avowries or cognizances, shall be drawn up upon a judge's order, to be made upon a rule to shew cause to be granted by the said Prothonotary or his deputy, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances; provided, that no such rule shall be made absolute, until leave to that effect shall have been actually given, by one of the judges of this Court, testified by his signature to the order. Provided also, that no rule to shew cause, or judge's order, shall be necessary in the following cases, that is to say, where the plea of *non assumpsit*, or *non detinet*, or never was indebted, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the Defendant, discharge under an insolvent act, *plene admisstravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases a rule shall be drawn up by the said Prothonotary or his deputy, upon the production of the ingrossment of the pleas.

Rule absolute to amend plea, may be granted by the Prothonotary, in certain cases.

16.—And it is further ordered, that the said Prothonotary or his deputy have power to issue rules *absolute*, to amend pleas, by adding or substituting a plea of payment, or further payment, of money into Court, or of set-off, or both, the Defendant undertaking by such rule, to go to trial at the following assizes.

Rule nisi to stay proceedings on bail bond.

17.—And it is further ordered, that the said Prothonotary or his deputy have power to issue a rule *nisi* to stay proceedings upon the assignment of a bail bond, the Defendant having filed special bail and having been surrendered in discharge thereof, which rule shall, upon being duly served, operate as a stay of the Plaintiff's proceedings, from the time of such service, until this Court or one of the judges thereof shall otherwise order.

Rule nisi to admit documents may be granted by the Prothonotary.

18.—And it is further ordered, that where due notice shall have been given of a party's intention to adduce in evidence any written or printed documents, and no consent shall have been given to make the required admission, pursuant to the rule of March assizes, 4 W. IV., the said Prothonotary or his deputy shall and may grant a rule to shew cause before one of the judges of this court, why the opposite party should not consent

to such admission, or in case of refusal be subject to pay the costs of proving the same documents.

19.—And it is further ordered, that the said Prothonotary or his deputy shall have power to grant rules to shew cause why a party should be allowed to strike out any counts, pleas, avowries, or other pleading, in the course of a cause; and why any Plaintiff or Plaintiffs should not give security for costs.

Rule *nisi* to strike out counts or pleas, and for security for costs, may be granted by the Prothonotary.

20.—And it is further ordered, that in future it shall not be necessary to sue out more than one writ of *Scire facias* for the purpose of reviving a judgment, but that a copy of the warrant granted by the Sheriff upon such writ shall be personally served; and in case an appearance be not entered at the return of such writ, or within eight days next after, the Plaintiff may, upon an affidavit of such service, and of the amount due, be at liberty to sign judgment, and issue an execution; provided always, that judgment may be signed by leave of a judge, after a return of *nihil* to one *Scire facias*.

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21.—And it is further ordered, that in any action for any debt or demand in which the sum sought to be recovered and indorsed on the writ of Summons shall not exceed twenty pounds, the Prothonotary or his deputy upon having produced to him an affidavit that the sum sought to be recovered and indorsed on the writ of Summons does not exceed twenty pounds, that issue has been joined in such action, and that the trial is not likely to involve any difficult question either of law or fact, shall grant a rule to shew cause before one of the judges of this Court, why a writ of trial should not issue directed to the Sheriff of Lancashire, or to any judge of any Court of Record for the recovery of debts in the said county, pursuant to the statute 4 & 5 W. IV., c. 62, s. 20.

Rule *nisi*, for a writ of trial may be granted by the Prothonotary.

22.—And it is further ordered, that eight days (exclusive) notice of trial of an issue before the Sheriff, or a Judge, as in the last rule mentioned shall be given; which notice shall specify the time and place of trial.

Notice of trial before the Sheriff &c.

23.—This rule prescribes the form of the writ of Trial before the Sheriff or a Judge, in pursuance of the statute 4 & 5 W. IV., c. 62, s. 20 (d).

Form of writ of trial.

24.—And it is further ordered, that every declaration shall, in future, be entitled of the day of the month and year on which it is filed.

Intitling declarations.

(d) See form ante pa. 273.

Commencement of declarations. This rule prescribes the forms of commencing declarations, which are given in another place (e).

Rule for a view.

25.—Whereas by statute 6 Geo. IV. c. 50, s. 23, a provision is made, that where a rule shall be drawn up for a view, the rule shall, if the Court or Judge granting the same think fit, require the person applying for the view, to deposit in the hands of the Under-Sheriff, a sum of money to be named in the rule, for payment of the expenses of the view. And whereas it is desirable that some general rule should be made upon this subject,—It is therefore ordered, that upon every application for a view, there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the office of the Under-Sheriff; that the sum to be deposited shall be ten pounds in case of a common jury, and sixteen pounds in case of a special jury, if such distance do not exceed five miles; and fifteen pounds in case of a common jury, and twenty-one pounds in case of a special jury, if it be above five miles: and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses the deficiency shall forthwith be paid by such attorney to the Under-Sheriff. And it is further ordered, that the Under-Sheriff shall pay, and shall account for the money so deposited, according to the scale following (f).

The following Rule was promulgated with those of March Assizes, 5 W. IV.

Costs in actions of Assumpsit, debt, or covenant, under £20.

26.—And it is further ordered, that in all actions of *assumpsit*, *debt*, or *covenant*, where the sum recovered or paid into court and accepted by the Plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds, without costs, the Plaintiff's costs shall be taxed in the Court of Common Pleas at Lancaster according to the reduced scale of costs in similar cases in the superior Courts at Westminster, as near as may be, according to the practice of the court.

(e) See ante pa. 117.

(f) See the scale ante pa. 166.

1.—It is ordered by the Court, that the date of the issuing of the process shall be stated at the commencement of every declaration hereafter to be filed, according to the form mentioned in the schedule hereto annexed, *mutatis mutandis* (g). Date of process to be stated in the declaration.

2.—And it is further ordered, that in cases of payment of money into Court by a judge's order, under 4 & 5 W. IV., c. 62, s. 23, such payment shall be pleaded, as near as may be, in the form following (h). Plea of payment of money into Court under 4 & 5, W. 4, c. 62, s. 23.

3.—And it is further ordered, that the Plaintiff, after the filing of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court, in full satisfaction and discharge of the cause of action, in respect of which it has been paid in; and he shall be at liberty, in that case, to tax his costs of suit, and in case of non-payment thereof, within forty-eight hours, to sign judgment for his costs of suit so taxed: or the Plaintiff may reply, "that he has sustained damages to a greater amount than the said sum;" and in the event of an issue thereon being found for the Defendant, the Defendant shall be entitled to judgment, and his costs of suit. Replication to such plea; and further proceedings.

(g) See the form ante pa. 117.

(h) See the form ante pa. 260.

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* Since the former part of this book was printed the present Undersheriff has discontinued holding a County Court at Liverpool.

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